EMPLOYMENT LAW BULLETIN

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TO OUR CLIENTS AND FRIENDS:

A lawsuit filed by the Equal Employment Opportunity Commission ("EEOC") against a McDonald's restaurant in Northport, Alabama is making national news. The suit involves an employee named Samantha Robichaud who has a condition (Sturge Weber Syndrome) that causes a Port Wine Stain on the majority of her face. Robichaud claims that the McDonald's store discriminated against her under the ADA by refusing to consider her for a management position and refusing to let her work the front counter. **The EEOC has consistently recognized this kind of facial disfigurement as a disability.**

Robichaud alleges that she was hired as a grill cook and given assurances that she would be considered for a promotion to management. However, she claims that she was removed from the front counter because of her appearance. She also claims that this would make her ineligible for a management position, because employees must be proficient in handling several areas of the restaurant to be eligible for management positions. Finally, she claims that she was told that she would never be promoted to a management position because of her appearance.

The EEOC does not claim that Robichaud was actually disabled, but claims that the restaurant *perceived* her as being disabled. The ADA includes this kind of claim in its definition of "disability" and protects persons from discriminatory treatment on this basis.

In its Interpretive Guidance for the ADA, the EEOC states:

> An individual satisfies the . . . "regarded as" definition if the individual has an impairment that is only substantially limiting because of the attitudes of others toward the condition. For example, an individual may have a prominent facial scar or disfigurement, or may have a condition that periodically causes an involuntary jerk of the head but does not limit the individual's major life activities. If an employer discriminates against such an individual because of the negative reaction of customers, the employer would be regarding the individual as disabled and acting on the basis of that perceived disability.

In order for an impairment to constitute a disability protected under the ADA, the impairment must be one that substantially limits, or in this case, one that McDonald's regarded as substantially limiting one or more major life activities. Robichaud can't avoid this requirement just because she claims she was regarded as having a disability. The Supreme Court has stated that, regardless of whether an employee asserts that her employer believes she has a substantially limiting impairment that she does not have, the employee must show that her employer regarded her as substantially limited in a major life activity. **It is not enough for Robichaud to show she has an impairment, or that McDonald's regarded her as having an impairment, she must show that McDonald's regarded her as having an impairment that *substantially limited a major life activity*.**

HOW TO AVOID "SALTY" LITIGATION

A union organizing technique is to try to place union organizers, or "salts," in an employer's workforce. The salts apply for employment and state on the application that they are employed by their particular union and are applying for purposes of

organizing the employer. Many also wear to the job interview clothing or caps identifying their union. The union's strategy is that if the employer refuses to hire these applicants, the union will then take the employer to the National Labor Relations Board, alleging that they were not hired because of their pro-union beliefs. The employer then faces the risk of back pay and instatement, unless it can prove that the applicant's union affiliation and organizing efforts were not the motivating factor for the decision not to hire.

The recent case of *International Union of Operating Engineers v. NLRB*, (7th Cir., 3/28/03) is instructive for how employers can avoid hiring salts and establish that the decision not to hire the salt was not motivated by the applicant's union support and efforts. **The employer, a construction company, first considered applicants who were former employees or referrals from current employees and supervisors. The employer also gave priority to applicants who were referred to the employer from a third party agency. Those applicants that received the lowest priority were walk-up applicants, including the union salts.** The company refused to hire the union salts, which predictably resulted in the union filing unfair labor practice charges. In upholding the NLRB's finding of no violation, the court said that the company's rejection of the union applicants "is entirely consistent with the company's long standing policy of hiring individuals referred from sources that it deems trustworthy over unknown or walk-in applicants; a policy long before Local 150's salting campaigns."

EEO TIP: TO MEDIATE OR NOT TO MEDIATE, THAT IS THE QUESTION

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Mediation has been used as a method of resolving disputes of all types in the context of labor disputes since time immemorial. However, mediation to resolve ordinary employment disputes arising under one or more of the federal anti-discrimination statutes has become in vogue only during the last five-year period. As matter of fact, the U. S. Equal Employment Opportunity Commission (EEOC) for the first time since its inception in 1965, offered a mediation program in 1999 to resolve some of the charges filed with it.

As conceived by the EEOC, mediation is an informal and non-binding process in which a neutral third party assists the opposing parties in trying to reach a voluntary, negotiated resolution of a charge of discrimination. It is an Alternative Dispute Resolution (ADR) procedure which obviates the need for the investigation and/or litigation of the charge in question. Moreover, the mediation process is confidential. Information disclosed during mediation must be destroyed or held in the strictest confidence. Under the EEOC's procedures the decision to mediate is completely voluntary for the charging party and the employer.

How the EEOC Mediation Process Works

1. After a charge is filed, the EEOC makes a pre-investigation determination as to whether the charge is appropriate for mediation. Not all charges qualify. Charges which allege broad class issues generally do not qualify. On the other hand charges which allege individual harm on the basis of disparate treatment, including for example, sexual harassment or a failure to promote, generally do qualify.

2. If the charge qualifies for mediation, the parties are contacted by an EEOC representative, and if they both agree, the matter is set for mediation. If not, the charge is processed according to the EEOC's regular investigative procedures.

3. If the parties agree to mediation, the case is assigned to a trained, experienced mediator and a specific time and date is set for the mediation session. Currently, the

EEOC only uses its own mediators because of budgetary restraints. However, independent, private mediators have been utilized in the past and may be utilized in the future. In either case the mediation service is free to the employee and employer. The mediator will set a mutually convenient time and place for the mediation after conferring with the parties.

4. During the course of mediation, the mediator does not decide who is right or wrong and has no authority to impose a settlement on the parties. He or she merely assists the parties in reconciling and resolving their differences. Either party can be assisted or represented by legal counsel at the mediation sessions. Generally, mediation sessions last from one to five hours.

5. Both parties must agree that strict confidentiality will be maintained as to everything that transpires during the mediation process. No recordings or transcription are made and any notes generated are required to be destroyed. Also the EEOC's Mediators are totally insulated from the investigative process. They are precluded from performing any functions related to the EEOC's regular investigative process or participating in any subsequent litigation.

6. If the parties resolve their differences and arrive at a settlement, it is reduced to writing and becomes enforceable as a settlement agreement. The fact of a settlement is reported to the EEOC and the underlying charge is dismissed. If mediation fails, the charge is returned to the EEOC's Investigatory Inventory and processed according to the EEOC's regular procedures.

Advantages of Mediation

< **Mediation is generally efficient and free.** The whole process usually takes less than 90 days from start to finish. Moreover the mediators are neutral third parties who have no interest in the outcome. *The entire cost is paid by the EEOC.*

< Mediation is a confidential process. Settlement agreements do not constitute an admission of any wrongdoing by the employer or the violation of any laws.

< **Mediation avoids a protracted investigation** including the submission of cumbersome, time-consuming documentation of personnel transactions. In most cases, the EEOC will postpone the deadlines for an employer to submit a position statement to allow the employer to avoid incurring the cost of preparing same.

< **Mediation avoids costly litigation.** There are almost no disadvantages to mediation except where the underlying charge, itself, is spurious and the process is used to extract a settlement that is tantamount to extortion. However, even that scenario can be exposed for what it is during the course of mediation.

According to the EEOC, its Mediation Program has been very successful. **Since its inauguration in 1999, the EEOC asserts that it has conducted more than 44,000 mediation sessions resulting in over 29,000 charge resolutions.** Moreover, the EEOC states that the average processing time was only eighty six (86) days per case. No statistics were available to indicate the correlative savings to employers in terms of lengthy investigations and costly litigation. Nonetheless, it is reasonable to assume that the savings to employers were equally impressive.

The question of whether to mediate a charge depends a great deal on what the charge is all about. Some things are worth fighting for, while others should probably be submitted to mediation. Employers should seek legal counsel if in doubt.

OSHA TIP: RETENTION AND DISCLOSURE OF EMPLOYEE MEDICAL AND EXPOSURE RECORDS

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.

OSHA standard 1910.1020 (formerly 1910.20) requires that employers preserve medical and exposure records pertaining to their employees. Medical records must be kept for the duration of employment plus thirty years while exposure records must be kept for thirty years. Access to such records must be granted to the employee, his or her designated representative and to OSHA. This standard does not require that any record be created but addresses only the issues of retention and disclosure.

For purposes of this standard, the following definitions apply:

(A) **"employee exposure record"** means environmental (workplace) monitoring of a toxic substance or harmful physical agent; biological monitoring results which directly assess the absorption of toxics or harmful physical agents; material safety data sheets indicating hazards to human health; chemical inventories; any other records revealing the use of toxic substances or harmful physical agents.

(B) **"employee medical record"** means a record concerning the health status of an employee which is made or maintained by a physician, nurse, or other health care personnel or technician....including medical or employment questionnaires; results of medical exams; medical opinions, diagnoses and recommendations; first aid records; descriptions of treatments and prescriptions; employee medical complaints.

Employee medical records **do not** include the following:

1. Physical specimens such as blood or urine samples.

2. Insurance or worker's compensation claims where they are maintained separately from the employer's medical program records and where they are not accessible to the employer by employee name or other identifier.

3. Records created solely in preparation for litigation which are privileged under the applicable rules of procedure or evidence.
4. Records concerning employee participation in voluntary assistance programs (drugs, alcohol or personal counseling).
5. First aid records for one-time treatment of minor cases (not meeting OSHA criteria for recording) made on-site by a non-physician where these are maintained separately from the employer's medical program and records.

A few points that may be helpful in addressing the requirements of the above standard are as follows:

- Note that the standard does not apply where the only "exposure" is to safety hazards such as trips, falls, cuts, etc.

- X-rays for fractures do not have to be preserved as a medical record where the examining physician finds no relationship between the event and a toxic substance or harmful physical agent. (Where x-rays are required to be retained, they may be stored on microfilm <u>except</u> for chest x-rays which must be kept in their original state.)

- Where a specific OSHA standard mandates retention of exposure records for a time period different than thirty years, the specific standard takes precedence. For example, OSHA's noise standard (1910.95) calls for only a 2 year retention of such records and would govern.

- Personal medical records for employees working less than one year do not have to be retained if they are provided to the employee upon termination.

- An alternative to storing material safety data sheets (MSDS) is to keep a record of the identity of the substance or agent with information on when and where it was used.

- Upon initial employment and at least annually each current employee should be advised of the existence of exposure and medical records and their right to access.

- The employer needs to notify the Director of the National Institute of Occupational Safety and Health at least three months prior to disposing of records that have reached the end of the required retention period.

EMPLOYER NOT REQUIRED TO ACCOMMODATE VIOLENT BEHAVIOR EVEN IF BEHAVIOR RESULTS FROM ADA DISABILITY

Is an employer required to accept angry, belligerent behavior by an employee toward other employees or customers as a form of reasonable accommodation under the ADA? No, ruled the court in *Koshko v. General Electric Company*, (N.D. Ill, Mar, 20, 2003). Employee Koshko was diagnosed by a psychiatrist as having "intermittent explosive disorder." This condition is characterized by "a failure to resist aggressive impulses that result in serious assaultive acts or destruction of property." The employee was treated with drugs and authorized to work his regular work day, but not overtime.

Shortly after returning to work, Koshko's manager criticized him for not working overtime and confronted him in a manner critical about his work. Koshko reacted by cursing, threatening to kill the manager and hitting his hand so hard on a tabletop that it started bleeding. His behavior resulted in his termination.

The court held that, even if it assumed that Koshko qualified for a disability under the ADA, the employer was not required to accept his outbursts at work a form of reasonable accommodation. According to the court, "an individual whose alleged disability disposes him to violent outbursts is not a 'qualified individual with a disability'." Therefore, an employer does not have to accept the risk of sporadic, disruptive or aggressive and threatening behavior as a form of accommodation. If the employer consistently applies its policies resulting in termination for such behavior, the employer may do the same with the individual even if arguably the behavior is due to a disability.

DID YOU KNOW . . .

. . . that workaholics work a lot because they enjoy it? Two Chicago researchers conducted a study of highly paid employees who work at least 60 hours a week. According to the study, the stereotype that workaholics work so many hours to avoid other issues in their lives, such as at home, is untrue. Rather, "they really enjoy the work they are doing, they are engaged, they are enriched." Predicably, many of those interviewed said they felt alienated from their families. According to the Bureau of Labor Statistics, 40% of male managers and 20% of female managers work at least 49 hours a week.

. . . that an employer's failure to include its FMLA policy in the employee handbook nullified the "rolling" period contained in the policy? *Dodaro v. Glendale Heights*, (N.D. Ill, March 29, 2003). The Village of Glendale changed its method of calculating FMLA to a rolling twelve month period. However, the Village failed to include this new method in its employee handbook. According to Department of Labor regulations, if an employer does not elect a rolling twelve month period or elects it improperly, then the correct period is the calendar year. According to the court, "to be consistent with a goal of enabling employees to stay aware of the applicable rules, the regulations should be construed as requiring that the election be incorporated in a permanent written document, such as a handbook, not simply conveyed in what could be a one time, stand alone 'other document'."

. . . that establishing work force surveillance is considered a mandatory subject of bargaining at unionized locations? *National Steel Corp. v. NLRB*, (7th Cir. April 3, 2003). The company installed surveillance cameras in the plant manager's office, to determine which employees were using the office to make unauthorized phone calls. Those who were caught on a surveillance tapes were terminated. The Steelworkers argued that the decision to install surveillance cameras was a mandatory subject of bargaining, and one which required the company to provide the union with information about the reasons and nature of the surveillance equipment. The court upheld the NLRB decision that it was a mandatory

subject of bargaining. According to the court, "we give substantial deference to the Board's determination that a matter is subject to mandatory collective bargaining because such determinations are within its particular expertise."

. . . that workers' compensation remedies were the sole relief available to an employee who claimed an employer was negligent in administering hearing tests? *Weber v. United Parcel Service, Inc.*, (Cal. Ct. App., April 3, 2003). Weber alleged that the contractor hired by the company to conduct hearing tests failed to properly analyze the test results and notify Weber that he should have his results checked further because a decline in hearing may be a sign of a brain tumor. A subsequent contractor conducted further hearing tests, and notified Weber that there was an abnormality in his hearing unrelated to noise exposure and that he should seek further medical treatment. Weber had a brain tumor that grew between the two tests and before Weber sought treatment for it. In rejecting his claim against UPS, the court said that "critical to the analysis of Weber's claim is the undisputed fact that but for his employment with UPS, Weber would have no basis for any claim against UPS under any legal theory. This fact mandates the conclusion that Weber's exclusive remedy lies in workers' compensation." Weber could pursue a separate claim against the testing service, but any claim against UPS was limited to workers' compensation relief, only.

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