# 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:*

This month marks our firm's ten year anniversary. We began on May 3, 1993 with five lawyers and two staff. We have grown to seventeen attorneys, three consultants and twenty-one staff. **The "formula" on which we founded the firm and remains our foundation is to remember that we are terminable at-will by clients; to be good listeners and creative lawyers who provide prompt service; to treat clients, each other, adversaries, regulators and the judiciary with the highest level of respect, and to enjoy our work.**

Two significant events occurred this month that coincide with our tenth anniversary. **On May 2, President Bush nominated our partner and friend Dave Proctor to serve as United States Federal District Court Judge for the Northern District of Alabama.** We are confident of a prompt and smooth confirmation process. We are proud that Dave was nominated, and we are proud of Dave's interest in public service.

We also received notification on Tuesday, May 13 that **our firm was rated as a "top quality boutique" and one of the most widely respected labor and employment law firms in the Southeast** by the *Chambers USA Guide*, which is a publication based upon interviews with competitors and adversaries. In the field of employment defense litigation, our partners David Middlebrooks, Dave Proctor and Barry Frederick were recognized as "leading individuals" by our competitors and adversaries.

## EMPLOYER AT RISK FOR RELYING ON INACCURATE BACKGROUND CHECK

The case of *Socorro v. IMI Data Search, Inc.*, (M.D. IL, April 28, 2003) is a background check horror story that hopefully will not happen to you. Socorro applied for a job at a Hilton Hotel in Chicago and was hired in August 2000 as Director of Sales and Travel Partner Relations. He answered "no" to the question on the employment application "Have you ever been convicted of a felony or misdemeanor?" The employment application also included a paragraph authorizing Hilton to conduct a background check. He did not sign or initial this paragraph.

Hilton hired IMI to check out Socorro's background. In September, IMI reported to Hilton that Socorro spent six months in jail for the conviction of a misdemeanor. Hilton then asked Socorro if he ever had a criminal conviction, and Socorro answered no. At that point, Hilton did not follow up with IMI to verify the report, nor did Hilton disclose to Socorro what the report stated. Instead, Hilton terminated Socorro. Hilton communicated to others that Socorro was terminated for falsifying his employment application and that he was a convict.

The court denied IMI's Motion for Summary Judgment. IMI argued that it was protected from suit under the Fair Credit Reporting and Disclosure Act. However, the court said that the FCRA does not protect a reporting entity if the information reported is false. The court also permitted Socorro to pursue his defamation and false light invasion of privacy claims against Hilton. **The court stated that Hilton disclosed the criminal conviction and falsification of application information with reckless disregard of whether such statements were in fact true.**

This case will likely result in an ugly outcome for Hilton and IMI if it proceeds to trial. Hilton made several mistakes, such as not even discussing with the employee the conflict between the credit report and the employee's response on the application. **Background checks are a good idea, and an even better one when handled properly**.

## EEOC ROADSHOW SOLICITS CHARGES

We appreciated receiving a newspaper article from a client in Dothan, Alabama on May 12, 2003 featuring the EEOC's "roadshow" to solicit charges. According to the article that appeared in the *Dothan Eagle*, three EEOC investigators "from the EEOC's Birmingham District Office are in Dothan helping local workers answer questions about employment rights and the violations that justify legal action." The investigators conducted an "open house" for individuals and remained in Dothan for several days to interview employees with concerns and accept discrimination charges.

Apparently the EEOC now has a "chargemobile." There are 51 EEOC offices throughout the United States, not counting state and local offices that are "deferral agencies," which also accept discrimination charges. Based upon the volume of charges and discrimination litigation, it certainly appears to us that individuals know where to go if they believe their rights have been violated. Rather than meeting with individuals to solicit charges, perhaps a better use of the EEOC's resources would be to meet with smaller employers to discuss compliance issues.

## PROMPT, REMEDIAL ACTION AVOIDS A "PINCH ON THE BUTT" FROM BECOMING A "KICK IN THE BUTT"

The case of *Meriwether v. Caraustar Packaging Company*, (8th Cir. April 18, 2003) is instructive for how prompt, remedial action can avoid harassment liability. Collette Meriwether alleged that a fellow employee grabbed her rearend, joked about the incident and blocked her from passing him by. This was reported to the employer, which suspended the employee pending an investigation. As a result of the investigation, the employee was suspended for five days without pay, was required to review and sign off on the company's harassment policy and to attend a training session regarding workplace harassment. He was also told that he would be terminated if he had any contact with the employee other than work related or if there were any other harassing complaints directed toward him.

In concluding that Meriwether was not entitled to recovery from the employer, the court determined that the employer (1) promptly investigated and took remedial action after it became aware of the complaint; (2) disciplined the individual and took further steps, such as requiring training, to prevent the behavior from continuing; and (3) the steps worked because the behavior ceased. The court also concluded that the co-employee's behavior did not "rise to the level of severe or pervasive conduct to alter the conditions of Meriwether's employment and create an abusive working environment."

## EEO TIP: NEW "REFERRAL BACK" MEDIATION PROGRAM

*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.*

A little over six weeks ago, in March of this year, the **Equal Employment Opportunity Commission (EEOC)** launched a new mediation pilot program called the "referral back" program. **Under this program, certain charges filed with the agency would be "referred back" to the employer for an attempted resolution under the employer's own, in-house alternative dispute resolution program.** The program is totally voluntary, but, unfortunately, it is not available to all employers at this time. The initial pilot study of the program is being conducted by the EEOC's Philadelphia District Office, but other District Offices will be phased into the program over the coming months.

According to Cari Dominguez, Chair of the EEOC, the agency is "interested in exploring whether existing employer-provided dispute resolution programs that

operate fairly and voluntarily, afford employees appropriate and meaningful remedies, and do not seek to interfere with the Commission's enforcement authority, can serve as an effective means of resolving employment discrimination charges filed with the EEOC."

Thus, the objective of the referral back program is at least two fold:

(1) It will provide a fast, amicable means of resolving employment disputes without the intervention of a third-party federal agency, and

(2) It would relieve the EEOC of a significant portion of its workload if an employee's charge could be settled by the parties themselves.

The procedures under the program are relatively simple as follows:

(1) An employee who files a charge against a "**participating employer**" may elect to have the charge held in suspense for up to 60 days to give the charging party and the employer an opportunity to settle or resolve the charge under the employer's existing dispute resolution program.

(2) If the dispute is resolved, a written settlement agreement is entered into between the parties and the charge will be closed by the Commission. If the dispute is not resolved within 60 days, the charge is returned to the EEOC for processing in keeping with its regular procedures.

There are however, certain qualifications that must be met both as to the employer's internal dispute resolution program and as to the kind of charge that will be acceptable for this special type of resolution. To qualify for the program an employer's ADR program must meet the following criteria:

< It must be an established program in which participation by its employees is strictly voluntary;

< The program must have clear, written procedures;

< It must be free to the employees;

< The program must be able to address all of the claims and relief that would be available under the statutes enforced by the EEOC; and

< Any settlement obtained must be in writing and enforceable in an appropriate court of law.

The charges eligible for the Referral Back Program will be the same as those eligible under the Commission's regular mediation program, namely, charges which allege individual harm under one or the other statutes currently enforced by the EEOC. However, class charges, systemic charges and Equal Pay Act Charges do not qualify because of their class aspects.

Under the Referral Back Program, the EEOC will recognize any agreement reached between the parties under the employer's ADR program. However, it will not participate in the drafting or signing of such agreements. Additionally, the EEOC will respect any confidentiality provisions included by the parties in their agreement. In effect this allows the employer and employee the freedom to work out any terms and conditions which may be pleasing to them without any second-guessing by the Commission.

The EEOC hopes that its new referral back program will be a great supplement to its regular mediation program which has been fairly successful. Under the regular mediation program since 1999, the EEOC, has conducted over 44,000 mediations and resolved over 29,000 charges within an average processing time of less than 86 days per charge. Hence, this could be a win-win situation for employers. We will keep you posted in this column of any developments pertaining to the program, especially any information as to when it will be available to employers in Alabama, Mississippi and the southeast.

## OSHA TIP: OSHA ENFORCEMENT

*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 has expended much effort in recent years in developing training and compliance assistance programs for employers. Many alliances and partnerships have been established with the regulated community and other parties who share a common interest in reducing workplace injuries and illnesses. There remains little doubt, however, that the cornerstone of the agency continues to be a "firm and fair" enforcement program. As with his predecessors, that point was made clearly by the current agency head, John Henshaw, upon taking charge. "Enforcement is the very underpinning of our work--it will not be diminished."

The numbers from last fiscal year indicate that the agency has made good on the projections of its boss. **The total number of worksite inspections was exceeded by over 1000, the average penalty per serious violation rose while the percentage of violations found to be serious was the highest ever at over 70%.**

In its budget request for 2004. the agency is committing to a slight increase in the number of worksite inspections.

While some employers have welcome and on occasion even requested an enforcement inspection, its fair to assume that most would prefer to delay or avoid such visits. A look at the agency's primary inspection triggers allows an employer to anticipate, and in some cases an opportunity to reduce the likelihood of a visit by an inspector.

Obvious deterrents to OSHA inspections are to avoid fatalities on the job and to keep the injury/illness rate for the site at a low rate. **Under their Strategic Targeting Plan the agency now directs planned inspections at the employers with rates two or more times higher than the average workplace. Employers are notified by letter from the Assistant Secretary that they are on the list of employers identified as having "high" injury frequency rates. A knock on the door by OSHA should therefore be no surprise should you make this list. Although its likely too late upon receipt of the letter to deter a visit, much may be done to prepare.** As suggested in the letter from the Assistant Secretary, the employer should take steps to address safety problems. This could involve getting assistance from the consultation service within the employer's state, from the workman's compensation carrier or from an outside source.

On- the- job fatalities, which have to be reported to OSHA within eight hours, will most likely result in an investigation. Many times the accident investigation, by policy or otherwise, will be expanded into a complete inspection of the workplace.

Finally, complaints and referrals are likely to bring OSHA to your site. Formal complaints are those signed by a current employee of a workplace or his/her representative. These will generally bring about an OSHA inspection. Having a good internal mechanism to allow employee safety concerns to be evaluated, and corrected if necessary, may head off OSHA involvement.

Nonformal complaints are those that aren't signed by a current employee or otherwise fail to meet the formality requirements. These, with rare exceptions, will result in contact from OSHA by telephone and/or telefax. The employer is asked to check out the specified complaint allegations and respond to OSHA. A prompt and satisfactory reply to OSHA will prevent an onsite inspection.

Referrals may come from OSHA personnel, other agencies or the media. They will likely lead to an inspection if they suggest that serious hazards may exist. Outdoor activities, such as construction operations, are common sources of referrals due to their easy visibility to OSHA personnel, the media etc.

## 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 several different items related to Wage Hour laws that employers should review from time to time.

1. **As school closes for the year, many employers will be asked to hire students for the summer. Before doing so the employer should ensure that the minor can legally perform the duties for which he/she is hired.** The child labor provisions of the Fair Labor Standards Act set a basic 16 minimum age for employment but there are 17 specific occupations for which the employee must be at least 18 years of age to perform. Among those occupations requiring the 18 year minimum age are the operation of a motor vehicle, operation of paper bailors, operation of power hoisting equipment and operation of power meat processing equipment. Employers need to be very cautious when employing minors as the illegal employment of a minor can result in the Department of Labor assessing a penalty of up to $11,000 for each minor found to be employed in violation of the Act.

2. At the end of March, the Department of Labor issued a notice of proposed rule making to amend the regulations that define the exemptions for Executive, Administrative, Professional and Outside Sales employees. This proposal, if adopted, will make some substantial changes in these regulations. An analysis of the proposed changes is available for review on our web site, LMPP.com. The Department has allowed a 90 day period for interested persons to submit written comments. The comments may be submitted by Email, fax or USPS mail. Once the comment period ends on June 30, 2003, DOL will analyze the large number of comments that are expected and hopes to issue a final rule by December 2003. If the final rule that is adopted is along the lines of the proposed rule, employers should be able to exempt additional employees from both the minimum wage and overtime provisions of the Act. In the mean time, employers should remember they still must meet all of the requirements in the existing regulations in order to claim the exemption for an employee.

3. On another positive note the U. S. House Education and Workforce Committee has passed a bill allowing private employers to grant employees compensatory time off in lieu of paying cash overtime. Public employers (governmental entities) have been allowed to use the procedure for over 15 years. There are some very strict criteria that must be followed, including the fact that the employee must voluntarily agree to accept the comp time, in order to use this provision of the Act. It is my understanding the House of Representatives is expected to vote on the bill very soon. If passed by the House the proposal will then go to the Senate for consideration.

4. **Litigation under the Fair Labor Standards Act remains a very hot topic with employers winning some and losing some.** In April 2003, the Eighth Circuit ruled for the employer in a case concerning the administrative exemption for a Claims Coordinator at a large insurance company. Conversely, one of the nation's largest insurance companies has decided to convert its claims examiners and underwriters to a nonexempt status rather than having continuous litigation regarding the application of the administrative exemption.

In an unrelated case the U. S. Supreme Court refused to consider a decision by the Sixth Circuit that denied the employer the ability to offset extra compensation paid in one pay period against overtime premiums that were due in another pay period. In a victory for the employer the Fourth Circuit held that South Carolina firefighters, who wear pagers while on call, are not entitled to overtime pay because they were not prevented from doing other activities during the period.

Employers should continue to evaluate their pay practices to ensure they are in compliance with the Fair Labor Standards Act, as the failure to do so can result in a substantial liability. If we can be of assistance do not hesitate to give us a call.

## DID YOU KNOW . . .

**. . . that certain e-mail spam received at work may contribute to allegations of a sexually hostile work environment?** Employers are responsible for taking all steps necessary to address or prevent workplace harassment. If employees receive pornographic spam, an employer's responsibility includes taking all reasonable steps possible to block the spam. Such steps include

notifying employees to report such spam to their MIS director or another systems resource person and, ultimately, implementing whatever steps are reasonable to block the spam.

**. . . that terminating an employee because the employee sought a lawyer regarding workplace issues did not change an employee's at-will status?** *Porterfield v. Mascari II, Inc.*, (M.D. Ct. App, May 8, 2003). Porterfield received a written warning, which she was asked to sign. She told her supervisor that she was advised to meet with a lawyer to review the document before signing it. Virtually immediately thereafter, she was terminated. She alleged "wrongful discharge." In rejecting her claim, the court stated that although Maryland law "indeed may favor access to counsel," Maryland does not recognize that the right to counsel is "a clear mandate of public policy sufficient to underlie a wrongful discharge action."

**. . . that an employer's average cost for health insurance per employee, per year will reach $10,946 by 2010, according to the Employment Policy Foundation?** The foundation's May 1, 2003 report stated that the average per employee cost of insurance for 2002 was $3,262. According to the report, "EPF's analysis underscores the importance of plan design in managing health insurance costs. Absent an effort to address healthcare at the national level, the projected health insurance costs may eventually make health benefits too expensive for employers to provide."

**. . . that sleeping on the job prior to hospitalization may have been notice to the employer under the FMLA?** *Byrne v. Avon Products, Inc.*, (7th Cir. May 9, 2003). The employee was hospitalized for depression. During the two week period prior to his hospitalization, he was periodically sleeping on the job, which resulted in his termination. Prior to this time, the employee's performance and work record were excellent. In permitting the case to go to the jury, the court stated that "perhaps . . . Byrne's unusual behavior was itself noticed that something had gone medically wrong, or perhaps notice was excused . . . for the statute requires notice only if the need for leave is foreseeable. It is not beyond the bounds of reasonableness to treat a dramatic change in behavior as notice of a medical problem." The court analogized sleeping on the job due to a medical problem to an employee who collapses on the job. In the latter situation, the court stated that it would not permit the employer to claim that "I fired the stricken person for shirking on company time, and by the time a physician arrived and told me why the worker was unconscious it was too late to claim FMLA leave."


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