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 is a reminder that we are offering our Effective Supervisor program during September and October in the following locations on the following dates: Huntsville, Holiday Inn Madison, September 16, 2003; Decatur, Holiday Inn Hotel & Suites, September 23, 2003: Montgomery, Governors House, October 7, 2003; Birmingham, Ramada Airport Hotel & Suites, October 14, 2003; Mobile, Radisson Admiral Semmes, October 28, 2003; Dothan, Dothan Holiday Inn, October 29, 2003.

Enclosed with the newsletter is information about the program and a registration form. For further information, including conducting such a program "in-house" for your organization, please contact Sherry Morton at 205/323-9263.

EEOC FAILURE TO CONCILIATE: CASE DISMISSED AND COMMISSION PAYS EMPLOYER ATTORNEY FEES

Title VII provides that "if after investigation, the Commission determines there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practices by informal methods of conference, conciliation, and persuasion." In the case of *EEOC v. Asplundh Tree Expert Company*, (Aug. 7, 2003), The Eleventh Circuit Court of Appeals ruled that the EEOC's failure to engage in meaningful conciliation justified the district court dismissing the Commission's racial harassment and retaliation lawsuit against Asplundh and ordering the Commission to pay Asplundh's attorney fees and costs.

A charge of racial discrimination, harassment and retaliation was filed in August 1996 regarding Asplundh's Gainesville, Florida location. In March 1999, the EEOC issued a Letter of Determination stating that there was "reasonable cause to believe the charge is true" regarding harassment and retaliation. On April 7, 1999, the EEOC sent the company's in-house counsel a proposed conciliation agreement, requesting a response by April 23, 1999, 12 business days later. The EEOC's conciliation proposal not only included relief at the site in Florida where the alleged harassment and retaliation occurred and which had since closed, but also included language that affected every Asplundh location throughout the United States. The company retained a Florida attorney who on April 28, 1999 wrote to the EEOC "I would like to arrange a phone call with you to discuss this case and attempt to understand the Commission's basis for its determination. Therefore, I ask that you extend the time for responding to the proposed conciliation agreement."

The EEOC never responded to the attorney's letter. The next day, April 29, 1999, the EEOC sent a letter to the company's in-house counsel, stating that efforts to conciliate were unsuccessful and "further conciliation efforts would be futile or non-productive." Phone calls from the company's outside counsel were not returned. On May 12, 1999, the EEOC filed a lawsuit, complete with a press conference in Miami and press releases nationally. In fact, an article about the case appeared in *The New York Times*.
According to the Eleventh Circuit, **the EEOC's statutory requirement to attempt conciliation means that (1) there must be a reasonable cause determination, (2)**

there must be an offer to the employer to engage in conciliation and (3) the EEOC must "respond in a reasonable and flexible manner to the reasonable attitudes of the employer." The court stated that the EEOC's behavior in this case "smacks more coercion than of conciliation." The court added that the EEOC's conciliation agreement proposal "included no theory of liability, demanded a remedy that was on the one hand, national in scope, and on the other, impossible to perform (because the Gainesville location closed). . . As we have said before, such an 'all or nothing' approach on the part of a government agency, one whose most essential function is to attempt to conciliation with a private party, will not do."

The increased number of charging parties who are represented by counsel has contributed to dissipating the role and need for the EEOC's litigation function. The EEOC may act in a desperate manner to enhance its litigation presence. Employers should hold the EEOC accountable to fulfill its statutory responsibilities to conciliate in the event a cause determination is issued, and to comply with the terms of its compliance manual regarding case processing.

Four days after this decision was issued, Eric Dreiband was sworn in as General Counsel of the EEOC. He previously worked for the United States Department of Labor. His term is for four years and he is responsible for supervising the EEOC's twenty-three Regional Attorneys and the legal staff in Washington, D.C.

ADA LITIGATION: GOOD NEWS, BAD NEWS

First, the good news: **The number of ADA lawsuits in which employers prevail over employees is overwhelming.** And that's no exaggeration. According to a study released by the American Bar Association in June, on a nationwide basis employers win more than 94 percent of all ADA cases brought by employees in federal courts. Employees do only slightly better if they try to resolve their claims through the EEOC. Cases involving **substance abuse and mental illness** are increasing, but (statistically-speaking) employees who make these types of claims do not increase their chances of winning their cases.

Now, the bad news: Most ADA discrimination cases brought against employers by employees are brought under Title I of the law. **But "public accommodation" litigation under Title III of the ADA has exploded in recent years,** and is increasing at a dramatic rate. Hundreds of lawsuits have been filed since 2002 against hotels, restaurants, hospitals, and retailers for violations of Title III of the ADA, i.e., failing to remove barriers to accessibility or to make their premises ADA-compliant.

The motivation for lawyers to file a lawsuit against a business for violating Title III is clear - **since the ADA provides for the recovery of attorney fees** on behalf of successful plaintiffs, lawyers view Title III as a cash cow. A business owner who is sued because a bathroom mirror was installed too high, or because the wrong color paint was used to designate handicapped parking spaces, may pay $100 to remedy the problem plus attorney fees to the plaintiff's lawyer to settle the case.

The most important thing that businesses can do to avoid vexing lawsuits is to remember that Title III of **the ADA imposes an ongoing obligation to comply with the law**, which means that a business must consider new and evolving technologies which may allow them to increase the accessibility of their business to the disabled. A business which could not feasiblely alter its premises to accommodate the disabled ten years ago may now be able to take advantage of new architectural and structural modifications to become ADA compliant.

AFL-CIO JOINS NON-UNION WORKERS

It is certainly a strange heading for an article. The AFL-CIO has tried so ineffectively to reach the 91% of the American private sector union free workforce. Here's their latest approach:

On August 5 and 6, the AFL-CIO Executive Council approved the creation of a new national organization called "Working America." The members of the organization will be non-union employees throughout the United States. The stated purpose of the organization is to involve those

workers in legislative and political issues in time for the 2004 campaign. **According to the AFL-CIO, workers are angry and afraid regarding extensive job losses during the past two to three years; 2.5 million manufacturing jobs have perished since January 2001 and approximately 11 million unemployed workers cannot find jobs.** Those who belong to the organization will pay a modest amount per year for dues, which has not been set. The organization will also provide the workers with information about healthcare, jobs and education.

Remember that virtually every decision made by the AFL-CIO has organizing new members as an objective. In creating "Working America," the AFL-CIO is counting on recruiting workers as individuals, then gaining strength in communities to organize the workplace where those individuals work. If the organization is viewed by its "members" as helpful, those members in turn become organizers at their places of employment.

POORLY PERFORMING EMPLOYEE NOT ENTITLED TO TRANSFER AS REASONABLE ACCOMMODATION

You no doubt have heard it before; transfer a problem employee to another department until ultimately the employee either improves or leaves voluntarily or involuntarily. The case of *Burchett v. Target Corporation*, (8th Cir. August 13, 2003) provided a variation of this theme, where a poorly performing employee asked for a transfer as a form of reasonable accommodation under the ADA.

Employee Lynn Burchett returned from disability leave with a diagnosis of clinical depression. As a form of reasonable accommodation, her employer reduced her work hours, changed the job requirements and provided greater flexibility for her in how she performed her duties. She failed to perform her job adequately and after receiving counseling from her supervisor, requested a transfer to a less stressful job. The company denied her request. Burchett went on disability leave again and never returned to work.

The reason why the accommodation by transfer was not necessary is because Burchett's disability was not a factor for her failure to perform her current job duties with accommodations. According to the court, "Not only did Burchett admit in her deposition that she could perform the functions of her position with the accommodations Target was providing, the record also shows that her doctor thought she could perform those functions."

Before an employer considers transferring an employee as a form of reasonable accommodation, the employer should determine whether accommodation at the current job is possible. If the employee is not performing adequately at the current job but the accommodation is still appropriate, then the employer need not transfer the employee as an accommodation. If an employer transfers the employee and the new job pays less, the ADA does not require that the employee receive the higher pay (Note that the opposite is true under the FMLA).

EEO TIPS: UNDERSTANDING THE EPA'S TRICKY LANGUAGE

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.

The Equal Pay Act (EPA) of 1963 makes it unlawful to discriminate on the basis of sex in the payment of wages or benefits for **equal work** on jobs the performance of which **requires equal skill, effort and responsibility,** and which are performed under similar working conditions in the same **establishment.**

This is a relatively simple statement of the law but the tricky language problem for employers is in defining for each job what constitutes "**equal skill**," "**equal effort**," and "**equal responsibility**." Does the law really mean what it says

with respect to the word "equal"?

It doesn't end there. There is also the problem of defining what is the employer's "**establishment**." Does a branch or division qualify as the "establishment" or does that term refer to the whole business, itself ? Even the word "**requires"** may be a stumbling block to employers.

Fortunately, the EEOC's Regulations provide some useful guidance in deciphering these terms in a way that can be understood and applied by employers. The guidance or standards set forth, therein, can be summarized as follows:

Equal Work. The term *equal work* does not mean that the jobs being performed by males and females have to be identical, only that they be substantially equal to meet the standards under the Act. For example, employers sometimes assign minor additional tasks to male employees such as lifting a box or carton after it has been filled at the end of an assembly line. On the other hand, females on the same line may be assigned a special sorting function prior to the filling process. If these separate tasks are in fact minor or insubstantial in terms of the overall work done during the assembly line process, any wage differential between males and females would probably be a violation of the EPA.

In making a determination as to what constitutes equal work, the controlling factor should be "job content," not the job's title. Job titles tend to be general in nature and frequently are unreliable in denoting equal work under the EPA. A good example is the job title of " clerk" which could encompass duties ranging from those of a file clerk to a stock clerk to an assistant to a Judge or Magistrate.

Equal Skill. Skill includes such factors as experience, training, education and ability. Where the degree of skill needed to perform one job is substantially greater than to perform another, the EPA may not apply even though the jobs are equal in all other respects.

However, the possession of a skill not needed to meet the requirements of the job cannot be considered in determining the equality of skill. Nor does the proficiency with which one does the job become a substantial factor unless the job is under a "piece-rate" system.

Equal Effort. Effort under the EPA is measured by the degree of physical or mental exertion needed to perform the job. Any job factors which cause (or alleviate) physical or mental stress or fatigue may be considered in determining the effort needed to perform the job. In the assembly-line example above if the male employee's task of lifting the box or carton at the end of the line creates substantial physical stress or fatigue, a wage differential may be justified.

Equal Responsibility The matter of responsibility is concerned with the degree of accountability required in the performance of the job with an emphasis on the consequences for a failure to properly perform. For example, where one clerk out of a group of retail clerks is given the responsibility of approving checks from customers while the others are not, any appropriate extra compensation for the additional responsibility may be permissible under the EPA. Of course if this added responsibility of approving checks is only given to male employees, it would no doubt violate Title VII even if it did not, technically, violate the EPA.

The word "Requires". The word "requires" in the phrase *… equal work on jobs the performance of which requires...* should not be interpreted to mean that the EPA would not apply unless the employer formally assigns the work in question to an employee. It applies if the employer knowingly allows the employee to perform the equal work.

Establishment. For the EPA to apply the work must be performed under **similar working conditions** in the same **establishment**. Similar working conditions are measured by two sub-factors, namely: the job "surroundings' which includes, for example, the presence of toxic chemicals or fumes in the work environment, and "hazards" which are measured by the actual physical hazards which are regularly a part of the work environment and the severity of injury which they could cause. Slight or insubstantial differences in working conditions are unlikely to justify pay differences. Shift differentials, for example, usually do not justify pay differences.

Although not specifically defined in the act the word "***establishment"*** refers to a distinct physical place of business rather than to an entire business or enterprise. An enterprise, for example, may include several separate places

of business. Thus, under the EPA, an establishment would be each physically separate place of business. This may or may not be a branch or division of the enterprise itself. In rare cases separate establishments have been found where two functionally separate units or divisions of the same company are operating from the same location.

Given the foregoing definitions and background information as to the critical terms used in the Equal Pay Act, the matter of employee remedies and the employer's defenses will be dealt with in this column next month.

OSHA TIP: CRIMINAL SANCTIONS UNDER OSHA

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.

While not commonplace, the possibility of facing criminal sanctions arising from OSHA investigations is real.

Section 17(e) of the Occupational Safety and Health Act provides that an employer who willfully violates an OSHA standard and that violation causes the death of an employee may, upon conviction, be fined up to $10,000 and **imprisoned** for no more than six months. For a second conviction, the maximum fine and sentencing period doubles. The maximum fines of $10,000/$20,000 referenced in 17(e) have since been increased by the Comprehensive Crime Control and Criminal Fine Act. The limits are now set at $250,000 per fatality for a guilty individual and $500,000 for a corporation. A second conviction allows for a one-year term of imprisonment.

In order to meet the criteria for a "criminal willful" violation, the following must be established:

1. The violation must be of a specific OSHA standard, not the general duty clause of the Act.
2. The violation must be willful rather than inadvertent or due to negligence.
3. The violation must be shown to have caused the death of an employee.

OSHA's Field Inspection Reference Manual directs an Area Director to carefully evaluate, along with the Office of the Solicitor, any fatality case involving a willful violation. Where it is agreed the foregoing elements are present, it's likely that the case will be prepared for referral to the Department of Justice. Since OSHA has not been hesitant to allege willful violations in fatality cases, a significant number of cases undergo screening for criminal referral.

An employer is also subject to criminal sanctions when he lies or covers up a violation. Section (17(g) of the OSH Act provides that falsifying information provided pursuant to the Act shall, upon conviction, be punishable by a fine of not more than $10,000 or by **imprisonment** for not more than six months, or by both.

There are numerous examples of employers who have suffered the consequences of some combination of bad judgment, bad luck, and inadequate safety programs.

The general contractor on a post office construction project was indicted when the structural steel collapsed, killing two employees, one of his own and one working for a subcontractor. OSHA issued willful citations for failing to properly bolt steel erection members and train employees, resulting in the collapse. The GC was convicted at trial, fined $500,000 for each of the fatally injured employees, and placed on probation for five years.

The president of a scaffolding company was indicted for five counts of manslaughter in the second degree and four counts of assault in the second degree. This followed the collapse of a scaffold at a building restoration site and the resulting deaths of five employees. The employer had been cited by OSHA for improperly erected scaffolding and failure to train workers.

The owner of a plumbing company pled guilty to the charge that he lied to the investigators of a trench collapse that had killed an employee. He was sentenced to five months in

prison, five months of home confinement, and two years of supervised release.

The regional manager, corporate safety director and site foreman of a steel erection company were each indicted after an employee fell to his death at a construction site. The company was cited by OSHA for willfully violating requirements to provide fall protection. The indicted individuals subsequently pled guilty to making false statements to investigators. The two managers were each sentenced to six months in prison and three years probation. The foreman was sentenced to four months in prison and three years probation. The corporation was fined $300,000.

How do you avoid being found in the position of the above? Always be in a position to demonstrate that you have made a <u>good faith effort</u> to find and correct hazards and to comply with OSHA standards. If a violation is found, this should make it unlikely that it will be alleged to be willful. The obvious answer to the "false information charge" is to level with investigators. Finally, consider involving your attorney early on in the event of a work-related death case.

WAGE AND HOUR TIP: OVERTIME REQUIREMENTS

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.

Although the FLSA has been in effect for some sixty-five years, many employers still do not understand the overtime requirements of the Act. Due to the extensive amount of litigation that is presently underway, I believe that it is imperative that employers review their pay practices to ensure they are paying overtime in a manner that is acceptable under the Act.

An employer who **requires or permits** a non-exempt employee to work overtime is generally required to pay the employee premium pay for such overtime work. Unless specifically exempted, covered employees must receive overtime pay for **hours worked** in excess of 40 in a workweek at a rate not less than time and one-half their regular rates of pay. Overtime pay is **not** required for work on Saturdays, Sundays, holidays, or regular days of rest, unless the employee has worked more than 40 hours during the workweek. Further, hours paid for sick leave, vacation and/or holidays do not have to be counted when determining if an employee has worked overtime.

The FLSA applies on a workweek basis. An employee's workweek is a fixed and regularly recurring period of 168 hours -- seven consecutive 24-hour periods. It need not coincide with the calendar week, but may begin on any day and at any hour of the day. Different workweeks may be established for different employees or groups of employees but they must remain consistent and may not be changed to avoid the payment of overtime. **Averaging of hours over two or more weeks is not permitted**. Normally, overtime pay earned in a particular workweek must be paid on the regular payday for the pay period in which the wages were earned.

The **regular rate** of pay cannot be less than the minimum wage. The regular rate includes all remuneration for employment except certain payments specifically excluded by the Act itself. Payments for expenses incurred on the employer's behalf, premium payments for overtime work or the true premiums paid for work on Saturdays, Sundays, and holidays are excluded. Also, discretionary bonuses, gifts and payments in the nature of gifts on special occasions and payments for occasional periods when no work is performed due to vacation, holidays, or illness may be excluded.

Earnings may be determined on a piece-rate, salary, commission, or some other basis, but in all such cases the overtime pay due must be computed on the basis of the average hourly rate derived from such earnings. Where an employee, in a single workweek, works at two or more

different types of work for which different straight-time rates have been established, the regular rate is the weighted average of such rates. That is, the earnings from all such rates are added together and this total is then divided by the total number of hours worked at all jobs. Where non-cash payments are made to employees in the form of goods or facilities (for example meals, lodging & etc.), the reasonable cost to the employer or fair value of such goods or facilities must also be included in the regular rate.

Some Typical Problems

Fixed Sum for Varying Amounts of Overtime: A lump sum paid for work performed during overtime hours without regard to the number of overtime hours worked does not qualify as an overtime premium. This is true even though the amount of money paid is equal to or greater than the sum owed on a per-hour basis. For example, a flat sum of $100 paid to employees who work overtime on Sunday will not qualify as an overtime premium, even though the employees' straight-time rate is $6.00 an hour and the employees always work less than 10 hours on Sunday. Similarly, where an agreement provides for 6 hours pay at $9.00 an hour regardless of the time actually spent for work on a job performed during overtime hours, the entire $54.00 must be included in determining the employees' regular rate.

Salary for Workweek Exceeding 40 Hours: A fixed salary for a regular workweek longer than 40 hours does not discharge FLSA statutory obligations. For example, an employee may be hired to work a 50-hour workweek for a weekly salary of $400. In this instance the regular rate is obtained by dividing the $400 straight-time salary by 50 hours, results in a regular rate of $8.00. The employee is then due additional overtime computed by multiplying the 10 overtime hours by one-half the regular rate of pay ($4 x 10 = $40.00).

Overtime Pay May Not Be Waived: The overtime requirement may not be waived by agreement between the employer and employees. An agreement that only 8 hours a day or only 40 hours a week will be counted as working time also fails the test of FLSA compliance. An announcement by the employer that no overtime work will be permitted, or that overtime work will not be paid for unless authorized in advance, also will not relieve the employer from his obligation to pay the employee for overtime hours that are worked.

Many employers erroneously believe that the payment of a salary to an employee relieves him from the overtime provisions of the Act. However, this misconception can be very costly as, unless an employee is specifically exempt from the overtime provisions of the FLSA, he/she is must be paid overtime when he works more than 40 hours during a workweek. Failure to pay an employee overtime can result in the employer being required to pay, in addition to the unpaid wages for a period of up to three years, an equal amount liquidated damages to the employee. Further, if the employee brings a private suit the employer can be required to pay the employee's attorney fees and if the Department of Labor makes an investigation they may assess Civil Money Penalties of up to $1100 per employee.

In order to limit their liabilities, employers should regularly review their pay policies to ensure that overtime is being computed in accordance with the requirements of the FLSA.

DID YOU KNOW . . .

. . . that DANA Corporation, an auto parts supplier, has agreed to "neutrality" language affecting its 262 union free facilities in the U.S.? This agreement was reached with the UAW on August 12, 2003. If more than 50% of employees at a facility sign authorization cards, the company agrees that it will not engage efforts thereafter to remain union free. Furthermore, if the signatures are verified, the company will recognize the union and commence bargaining immediately. According to DANA, "This new partnership agreement reinforces our relationship and supports the freedom our people have always enjoyed to chose whether or not they wish to be represented by a union."

. . . that OFCCP has stated "when our compliance officers don't see discrimination at the desk audit, we close the case and go down our list looking for bigger fish?" This statement was made by Agency Director Charles James on August 13, 2003. According to James, compliance reviews need to be done faster and the agency

needs to emphasize compliance by the larger employers. Its focus on larger cases, according to James, means that the agency will like pursue fewer cases.

. . . that an employer requiring an employee to participate in mandatory counseling must pay for the time spent in counseling as "working time" under the Fair Labor Standards Act? In the case decided in September 2003, *Sehie v. City of Aurora* (N.D. Ill), the court ruled that requiring an employee to travel and attend counseling was compensable time. The FLSA requires that employers pay employees for time spent required by the employer and that primarily benefits the employer.

. . . that the Paper, Allied - Industrial, Chemical and Energy Workers International Union on August 21 endorsed Dick Gephardt in his bid for the Democratic nomination for 2004? Other unions that have endorsed Gephardt include the Steelworkers and the Teamsters. According to PACE, "Time and time again he has proven his support for the American worker, whether it was concerning unfair trade agreements or health care for all." Based upon Gephardt virtually disappearing from the polls among the nine Democratic candidates, it appears that once again organized labor has picked a winner.

. . . that one in five employees in the United States was laid off between 200 and 2003? This is according to a survey conducted by Rutgers University and The University of Connecticut. Predicably, the lesser educated individuals were at the highest level of layoffs. Seven out of ten of those laid off workers surveyed expressed difficulty in finding new work; 35% of those laid off employees said their new job pays less; 19% say their new job pays about the same and 47% say their new job pays more.

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