"Your Workplace is our Work"®

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LEHR MIDDLEBROOKS PRICE & VREELAND P.C.
LABOR & EMPLOYMENT LAW

Employment Law Bulletin

To Our Clients And Friends:

Our firm has a new name, a new look and a continued commitment to provide our clients with the highest level of service and professionalism. Our former partner, The Honorable R. David Proctor, was sworn in as United States District Judge for the Northern District of Alabama on September 24, 2003. We welcome to the firm name Al Vreeland. Al is our managing shareholder and was one of the original five attorneys who started our firm.

"READY, FIRE, AIM!" CREATES FMLA LIABILITY

May an employer fire an employee before she concludes a legitimate FMLA leave if the employer has evidence that the employee will not return to work? Not so fast, ruled the court in the case of *Mendoza v. Micro Electronics, Inc.* (N.D. Ill Sept. 2, 2003).

The employer miscalculated the employee's amount of FMLA leave by five days; the employer told the employee her leave expired on December 31 when it should have expired on January 5. The employer notified the employee on January 4 that she was terminated effective December 31, for not reporting to work after that day. The employer attempted to correct its miscalculation by sending the employee a letter on January 23, stating that her leave had actually expired on January 5. Thus, the employee was terminated five days before her leave should have expired.

The employer terminated the employee prior to the expiration of the leave because the employer believed that the employee said she would not return to work for six weeks after the conclusion of the leave. According to the court, "While the fact that plaintiff may have told Micro Center that she would not return to work for six weeks may very well affect what damages she is entitled to, it does not change the fact that

Micro Center miscalculated the twelve week period and terminated Mendoza during her leave."

This case is different from an employer's right to terminate an employee if the employer would have done so had the employee not been absent for FMLA reasons. If an employee engages in behavior which would have resulted in the employee's termination had the employer known it prior to the leave, the employer usually may terminate during the employee's leave. An example would be if an employer first learned of falsification of records or stealing during the employee's leave. However, if the employer knew of the information prior to the leave and then terminated during the leave, the employer would have to explain why it waited and why the leave was not a factor in the employer's decision.

STRAY AGEIST REMARKS COST EMPLOYER $842,218

"Kids say the darndest things," Art Linklettter said after years of interviewing them on television. In the workplace, Art Linkletter's comment could be "officers, managers and supervisors say the most dangerous things." The case of *Palasota v. Haggar Clothing Company,* (5th Cir., September 3, 2003) illustrates the point.

Palasota sold clothing for Haggar for twenty-eight years until he was fired at age 51. Palasota sued under a number of theories, including the ADEA. The district court overturned the jury's verdict and award of $842,218, but the Fifth Circuit Court of Appeals reinstated it.

The company's vice president for sales, to whom Palasota reported, distributed a memorandum in which he recommended severance packages for fourteen sales associates, all whom were identified in the memorandum as being at least 50 years old. The memo stated that it was necessary to sever the employees who were over 50 to give the company "flexibility to bring on some new players that can help us achieve our growth plans." The national sales manager called Haggar's sales force an "ageing, graying sales force," and the president of the company referred to the "graying of the sales force" and said that the current sales "plowhorses" needed to be replaced with "racehorses." During this time, Haggar was embarked on a national advertising campaign to project a "youthful" image.

Haggar argued that the manager's memo and the other ageist comments were "stray remarks," which were not related to the termination decision. However, the Court of Appeals stated that because the memo was age related, close in time to the termination decision and related to the termination decision, there was nothing about the memo that could be considered "stray remarks" from an age discrimination perspective. The statements in the memo and spotlighting the ages of the individuals recommended for termination were ample evidence for a jury to conclude that age was the basis for their termination.

Which remarks are "stray" and which are evidence of an improper motive? Factors to consider include whether the person who made the remarks was involved in the ultimate employment decision, the timing of the remarks in relation to when the decision was made and the authority of the person who made the remarks in relation to those making the ultimate decisions. What could an HR professional do if decision makers or those who could affect such a decision make written or verbal comments analogous to those in the *Palasota* case? Disavow those remarks to those who received them, if possible exclude the individual who made the remarks from the decision-making process and counsel with that individual about why those remarks conflict with the employer's equal employment opportunity policies. If a legal dispute arises,

the employer wants to show its efforts to be sure that those inappropriate remarks were addressed and did not influence its decision.

THE FUTURE UNIONS SEEK: WHITE COLLAR EMPLOYEES AND NO ELECTIONS

According to the AFL-CIO Department for Professional Employees, over half of the AFL-CIO's 13,000,000 members (this includes private and public sector employees) are professional employees. Approximately 4,000,000 of their members include attorneys, engineers, teachers, journalists, pharmacists and scientists. A total of 66,000 new members who are either professional, technical or administrative workers were added to the union rolls last year. In fact, for the year 2002, over one-third of all new union members fell into the administrative, professional or technical employee category.

Why the increase in white collar unionization? There are two key reasons. The first is job security. Historically, "blue collar" employees view job security as an issue of fair treatment by their supervisor. In recent years, "white collar" employees have viewed job security as whether they will have a job tomorrow even if they do a good job today. The second reason is working conditions. A concern we often hear is that white collar employees who have survived work force reductions are asked to work harder, work longer hours and do not receive much more income to do so. Job security and working conditions may make unions an appealing alternative.

On July 31, 2003, Sen. Charles Schumer (D. NY) introduced legislation that would require employers to recognize and bargain with the union if the union could show that over half of the employees signed union authorization cards. Ultimately, the recognition of the union would lead to binding arbitration if as a result of collective bargaining no agreement was reached. Binding arbitration means that ultimately an arbitrator decides the terms of the contract; employer leverage at the bargaining table would disappear.

The AFL-CIO has historically found sponsors of similar legislation, with no passage. The outcome of this legislation should be no different. However, the proposal is part of an AFL-CIO coordinated plan to increase its participation in the political process to affect the outcome of the 2004 elections throughout our country.

OSHA RECORDKEEPING

This article was prepared by John E. Hall, OSHA Consultant for the law firm of Lehr Middlebrooks Price & Vreeland, 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.

Employers have now had about 18 months of experience with the "improved and simplified" injury/illness recordkeeping system. Our very limited and unscientific poll suggests that it has generally lived up to its billing and most users are finding it to be better than its predecessor.

As with the replaced version, the new injury and illness recordkeeping system has generated questions and surely will continue to do so in the future. The following are agency interpretations given in response to a few inquiries:

- A recommendation by a physician or other licensed health care professional to use a prescription medication, or a non-prescription medication at prescription strength, is medical treatment and should be recorded. This is true whether or not the prescription is filled and the medication taken.
- An injury or illness must be recorded, if it otherwise meets the criteria for recording, whether or not the employer had control over the circumstances or was in any way at fault.

- If an employee with a work-related injury or illness is given oxygen in an ambulance on the way to the hospital, the case would be recordable even if no further medical treatment is given at the hospital.
- Assume an employee was told by a physician not to return to work until he had an MRI on a work-related bruise on his knee. After missing some workdays the MRI was performed with negative results. In spite of this, the case must be recorded with the appropriate days away based upon the physician's recommendation.
- The first broad-based data comparisons between the two systems will be available when the Bureau of Labor Statistics releases its report for 2002, the year the revised system went into effect. That report is scheduled to be out this coming December.

The current year of 2003 brought new criteria for recording hearing loss cases. The federal OSHA standard now requires that employers record work-related hearing loss cases when an employee's hearing test shows a 10-decibel (dB) standard threshold shift from his/her initial test **and** the employee has an overall hearing level of 25dB or more. The old criteria recorded just 25-dB shifts in hearing. This change is causing a significant increase in the recording of hearing loss cases. This was expected and was noted in the rulemaking. The agency will presumably take this into account when evaluating an employer's injury/illness rates.

EEO TIPS: THE EPA'S REMEDIES AND DEFENSES

This article was prepared by Jerome C. Rose, EEO Consultant for the Law Firm of Lehr Middlebrooks Price & Vreeland, P.C. Prior to his association with the firm, Mr. Rose served for over 22 years as the Regional Attorney for the Birmingham District Office of the EEOC. As Regional Attorney Mr. Rose was responsible for all litigation by the EEOC in the states of Alabama and Mississippi. Mr. Rose can be reached at (205) 323-9267.

According to recent publications from the U. S. Equal Employment Opportunity Commission (EEOC), that agency filed approximately 364 lawsuits under the Equal Pay Act of 1963, and/or the EPA/Title VII concurrently, between 1979 and the end of May, 2003. The data shows that the Commission resolved 359 of these suits and obtained over $28 million in monetary relief as well as other remedial relief for the charging parties named therein.

In addition to the remedial relief obtained through lawsuits, the Commission also resolves a significant number of EPA cases through predetermination settlements and conciliation agreements. By law the specific details of such settlements must be kept confidential. However, the Commission's results are available for public information purposes. Overall, it was found, for example, that during the ten-year period between 1992 and 2002, the Commission resolved approximately 2,527 charges under the EPA, through settlements and obtained over $36.3 million in remedial relief for the charging parties involved.

As a specific example of cases of this nature, the EEOC reported that in fiscal year 2003 it had obtained a voluntary (pre-litigation) settlement of an EPA/Title VII charge which included $200,000 in back pay and liquidated damages for one Charging Party. In that case, the EEOC claimed that a female employee with similar experience was paid less wages than comparable male employees, and that she was performing substantially similar work requiring equal skill, effort and responsibility. According to the EEOC, the employer's gender-related justification for the wage differential was not supported by the facts. Apparently, the employer agreed and entered into a settlement of the charge.

Although the full details of this case were not disclosed, it provides a good illustration of the extent to which the EEOC and the private bar seek enforcement of the EPA. It also provides an example of the significant monetary penalties which may be assessed on behalf of a single complainant. The various remedies

available under the EPA can be summarized as follows:

Remedies

Back pay. Individuals can recover back wages due for up to two (2) years prior to the filing of an EPA lawsuit. If the employer's violation was found to be "willful," back wages can be recovered for up to three (3) years. A willful violation is one that the employer knew or should have known was unlawful under the EPA. For example, deliberately paying females less than males where both are performing similar jobs.

Liquidated damages. Liquidated damages are an amount equal to any back pay which may be due. Thus, in effect the assessment of liquidated damages makes the employer liable for an amount which is double the original amount of any back pay. However, if an employer can show that it acted in good faith based upon a reasonable assessment of the job's requirements in terms of equal, skill, effort and responsibility, the Court may not grant liquidated damages as a part of the remedy**.**

Attorney's fees. Reasonable attorney's fees are considered to be a part of the remedy where the employee obtains private legal counsel in order to enforce his or her rights under the EPA.

Injunctive Relief. A court may grant injunctive relief in the form of an order requiring the employer to discontinue any wage practices found to be unlawful under the EPA. In connection with this type of a remedy, the EPA specifically, prohibits an employer from decreasing the wages of one sex to equalize the pay of both sexes. The wages of the under-paid sex must be raised instead.

Fortunately, the EPA also provides some broad-reaching defenses. Wage differentials are permitted when they are based upon one or more of the following factors:

Defenses

Length of Service. Where the employer has an established seniority system which includes wage increments based upon years of service, the resultant wage differences would be lawful.

Merit Increases. Any wage differences based upon merit increases are lawful provided of course that the system is administered objectively without regard to sex.

Quantity or Quality of Production. Piece-rate systems or production bonuses granted to individual employees are lawful. But again, any system where the production rates are stacked in favor one sex over the other may be suspect under the EPA as well as Title VII.

Any factor other than sex. In addition to the above specific defenses an employer can establish wage differentials based upon any factor other than the sex or gender of its employees. For example, an employee's job related education, training or experience may justify a wage differential. However, care must be taken to ensure that such factors are necessary to the performance of the job, that is, they must directly enhance the performance of the job itself. Another factor other than sex could be "red-circled" rates where an employee is transferred from a higher paying position into a lower paying position for some business related reason (e.g. a valuable employee with ill health). In such instance an employee may continue to pay a male employee, for example, at a higher rate without having to raise the wages of all the females employees in that department.

These defenses would seem to give employers wide latitude in designing compensation rates for various jobs. However, care should be taken to ensure that any wage differential adopted for any job or job group does not have an adverse impact upon either sex where the other sex is performing jobs of a similar nature. If in doubt legal counsel should be consulted to avoid a potentially costly violation.

HOURS WORKED UNDER THE FAIR LABOR STANDARDS ACT

This article was prepared by Lyndel L. Erwin, Wage and Hour Consultant for the law firm of Lehr Middlebrooks Price & Vreeland, P.C. Mr. Erwin can be reached at (205) 323- 9272. Prior to working with Lehr Middlebrooks Price & Vreeland, 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 most employers are generally aware of the requirements of the FLSA not everyone understands what constitutes "hours worked" for which the employee must be compensated. Thus, I would like to remind you of some things that can, if not properly addressed, cause employers significant problems.

Employ Includes "to suffer or permit to work." Work not requested but allowed to be performed is work time that must be paid for by the employer. For example, an employee may voluntarily continue to work at the end of the shift to finish an assigned task or to correct errors. The reason is immaterial. The hours are work time and are compensable. In some situations where the employer had instructed employees not to perform the work and was not aware that it was being done, the courts have held that the employer did not have to pay for the time. However, if the employer is aware that the work is being done he must pay for this time.

Workweek 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. Each workweek stands alone. For example if an employee works 35 hours the first week of a pay period and 45 hours the second week, he is entitled to 5 hours of overtime pay even though his total hours in the pay period are only 80. The workweek may not be changed for the purpose of evading the overtime requirements of the FLSA.

Waiting Time Whether waiting time is time worked under the Act depends upon the particular circumstances. Generally, the facts may show that the employee was engaged to wait (work time) or the facts may show that the employee was waiting to be engaged (not work time). For example, a secretary who reads a book while waiting for dictation or a fireman who plays checkers while waiting for an alarm is working during such periods of inactivity. These employees have been "engaged to wait" and the time spent in these activities must be counted when determining hours worked by the employee.

On-Call Time An employee who is required to remain on call on the employer's premises is working. An employee who is required to remain on call at home, or who is allowed to leave a message where he/she can be reached, carries a pager or a phone in most cases is not working while on call. However, if the restrictions placed on the employee are so severe that he may not use the time for his own benefit such time could be construed to be hours worked.

Rest and Meal Periods Rest periods of short duration, usually 20 minutes or less, are common and must be counted as hours worked. Bona fide meal periods (typically 30 minutes or more) generally need not be considered as work time. The employee must be completely relieved from duty for the purpose of eating regular meals. The employee is not relieved if he/she is required to perform any duties, whether active or inactive, while eating. Although not required, by the regulations it is a good practice for the employee to leave his work area while taking a meal break.

Sleeping Time and Certain Other Activities: An employee who is required to be on duty for less than 24 hours is working even though

he/she is permitted to sleep or engage in other personal activities when not busy is considered as working the entire time. Whereas, an employee that is required to be on duty for 24 hours or more may agree with the employer to exclude bona fide regularly scheduled sleeping periods of not more than 8 hours, provided adequate sleeping facilities are furnished by the employer and the employee can usually enjoy an uninterrupted night's sleep. No reduction is permitted unless the employee receives at least 5 hours of sleep.

Lectures, Meetings and Training Programs: Attendance at lectures, meetings, training programs and similar activities must be counted as working time unless four criteria are met, namely: the training is outside normal hours, attendance is voluntary, the training is not job related, and no other work is concurrently performed.

Travel Time The principles that apply in determining whether time spent in travel is compensable time depend upon the kind of travel involved.

Home To Work Travel An employee who travels from home before the regular workday and returns to his/her home at the end of the workday is engaged in ordinary home to work travel, which is not work time.

Home to Work on a Special One Day Assignment in Another City An employee who regularly works at a fixed location in one city is given a special one day assignment in another city and returns home the same day. The time spent in traveling to and returning from the other city is work time, except that the employer may deduct the amount of time the employee would normally spend commuting to the regular work site.

Travel That is All in the Day's Work Time spent by an employee in travel as part of his/her principal activity, such as travel from job site to job site during the workday, is work time and must be counted as hours worked.

Travel Away from Home Community Travel that keeps an employee away from home overnight is travel away from home. Travel away from home is clearly working time when it cuts across the employee's workday. The time is not only work time on regular working days during normal working hours but also during corresponding hours on non-work days. The Department of Labor does not consider as work time that time spent in travel away from home outside of regular working hours as a passenger on an airplane, train, boat, bus, or automobile.

Driving Time Time that an employee spends driving an employer's vehicle is work time. If an employee is directed by the employer to drive the employee's vehicle to transport tools, supplies, equipment or other employees the time is also considered as hours worked.

Employers should remember that the failure to correctly pay for hours worked by an employee can create a substantial liability. Not only may an employee recover unpaid wages for a two or three year period, he can also be awarded liquidated damages (an amount equal to the unpaid wages) plus attorney fees. In addition, the Department of Labor can assess a penalty of up to $1,100 per employee for repeated or willful violations of the Act.

DID YOU KNOW

. . . that on September 8, 2003, OSHA announced three new efforts to expand its Voluntary Protection Program; the new programs are the VPP Challenge, VPP Corporate and VPP Construction. The Challenge program will be available for any private employer to join, regardless of its safety record. The Corporate program intends to expand the number of facilities current VPP participants cover. The Construction program will be a new program beginning in 2004. Currently construction sites are not part of the VPP program, because of the difficulty in

establishing such a program at a work location that changes daily.

. . . that according to a Hewitt Associates survey, salary increases for 2003 were the lowest in the survey's 27 years? The survey was reported on September 9, 2003, based upon information from 1,200 organizations. 2003 average salary increases were 3.4% for salary - exempt, 3.3% for salary non-exempt, 3.3% for non-union hourly and 3.5% for executives. Eight percent of the companies who responded reported a salary freeze for 2003.

. . . that the EEOC effort to reorganize is being resisted by some of its own employees? The EEOC conducted a meeting on September 8, 2003 with several of its district directors and other field employees to discuss ways to streamline the agency. Some of the approaches included closing and consolidating some field offices and establishing a national call center. One district director said that if the EEOC wanted to streamline and cut costs, it should start by looking at its own location in Washington, D.C. The EEOC pays $8,000,000 a year for its ten story facility in Washington, D.C. Several EEOC district offices throughout the country are not in expensive urban locations, in contrast to the national office. Opposition to the streamlining approach was also voiced by the President of the EEOC employees union, which is the National Council of EEOC Locals Number 216.

. . . that according to the Bureau of Labor Statistics, the percentage of U.S. employees covered by health insurance declined 18% over the past ten years? In 1993, 63% of all American employees were covered by health insurance; in 2003, that figured declined to 45%. One of the primary reasons for the decline is the shift of the economy to service sector industries, which often do not offer employees health insurance. Interestingly, 18% of employees have a child care assistance benefit through their employer.

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