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

Employment Law Bulletin

To Our Clients And Friends:

We are approaching the time of the year when employers have an excellent opportunity to communicate significant and meaningful employee relations messages to the workforce. We offer two suggestions for your consideration. First, send a Thanksgiving letter to the employee's family reflecting on what we have to be thankful for within the company, our state and country. Express your thanks for the effort and commitment of the employee and the employee's family to your company, and mention that although we have challenges and concerns at work and otherwise, we also have much to be thankful for.

Our second suggestion is to communicate in person with the workforce (if possible) in December business information regarding how the business performed during 2003 and what is anticipated during 2004. What challenges does the company face within the industry? What are the performance goals for 2004? Providing employees with such business information contributes to employees feeling a sense of belonging. Employees are investors, in the sense that they are investing their working years with your company. Provide your employee investors with information regarding their investment.

REFERENCES: BE NEUTRAL OR TRUTHFUL, OR ELSE PAY THE PRICE

The case of *Gibson v. Overnite Transportation Company*, (Wisc. Ct. App, September 23, 2003) is a $283,000 example of what can go wrong when a reference is an opinion, not fact. Gibson resigned from Overnite to accept an offer with another trucking company. During his probationary period with his new employer, Gibson was terminated after his new employer received a negative reference from Overnite (Note the mistake of hiring someone before you receive the necessary background information). It took Gibson approximately eighteen months to find other work.

A jury concluded that Overnite's reference communication was malicious and awarded Gibson $283,000.

Here's how Overnite went wrong. Overnite's operations manager provided the reference. He stated that Gibson was "way below average." He also said that Gibson had a poor work ethic and attitude. Furthermore, he said that Gibson was late "most of the time," missed two or three days a week of work and was not respectful of authority. As if this was not enough, the manager added that Gibson tried to be everybody's friend, but "people saw through him." He said he would never rehire Gibson.

These statements were unsubstantiated by Gibson's employment record with Overnite. There was no discipline or counseling for Gibson's alleged performance problems. So how does an employer avoid this situation?

Unless required by state law, an employer is not required to provide a reference. It may provide only "neutral" information, such as first and last dates of employment, compensation and job titles.

An employer also has the right to provide a truthful reference. Here's how you can do it:

- Require from the prospective employer a broad authorization and release signed by your former employee waiving any claims arising from the reference.
- The reference should be factual, not opinion. For example, if the employee was absent eight times on Fridays and Mondays over a brief period of time, that is a fact and you may state so. If, however, you believe the absences were due to alcohol or substance abuse, that is an opinion and you should not give it.
- The former employee should be the first to know what reference you will provide.
- Centralize the authority regarding who may provide disclosures or references about current or former employees.
- Remind managers and supervisors that if they receive inquiries about current or former employees, those inquiries should be referred to human resources for evaluation and possible response.

COURT APPROVES BUSINESS NECESSITY OF "ENGLISH ONLY" RULE

An employee who was terminated after several warnings to follow the employer's "English only" rule did not have a valid claim of national origin discrimination, according to the court in the case of *Cosme v. Salvation Army* (D. Mass, Sept. 23, 2003). The employee had a limited ability to speak English. She worked as a clerk at the Salvation Army's Thrift Store. This position entailed regular and significant customer contact.

The Salvation Army's employee handbook included the following "English Language Policy:"

> Employees at all times while on Center premises, other than during break and meal periods and before and after work [are required to] utilize English, to the best of the employee's ability, when speaking to any other employee beneficiary, customer or to a supervisor.

Cosme's store manager received several complaints from other employees and store volunteers that Cosme "made them feel uncomfortable and excluded" by speaking Spanish on the store floor. Cosme was terminated after she was told several times to comply with the policy.

According to the EEOC, English only rules may be permitted when the employer can "show the rule is justified by business necessity." However, if the employer fails to communicate the rule to employees yet hold employees accountable to it, the EEOC states that the rule may be evidence of national origin discrimination.

The Salvation Army's policy was not written in Spanish. According to the court, the employer's policy was promulgated for legitimate business reasons. And, "although the handbook was available only in English and The Salvation Army failed to produce an affidavit or testimony to verify the stated purpose, the court finds that The Salvation Army has - - albeit minimally - - complied with EEOC regulations, even if the regulations were [not] binding on this court."

If an employer seeks to establish an English only language policy, the employer must communicate the policy to employees in a language they understand, have compelling business reasons to require the policy, limit the application of the policy to only where it is necessary (note The Salvation Army's policy excluded break and meal periods and before and after work on their premises) and apply the policy consistently.

"LAST CHANCE AGREEMENT" COVERING PERSONAL TIME BEHAVIOR DOESN'T VIOLATE ADA

Employee Ira Longen was hired in July 1974 and beginning in 1993 had five separate occasions of treatment for chemical dependency. Some of these treatment programs included a "last chance agreement" whereby any further chemical dependency would result in termination. After the last treatment program, the company and Longen once again entered a last chance agreement which stated: "Future use of any mood altering chemicals, including alcohol, are a violation of working rules generally related to chemical dependency will result in immediate termination . . ." When Longen was on a leave of absence due to a job related injury, he was arrested for driving while intoxicated and terminated. *Longen v. Waterous Company*, (8th Cir. October 20, 2003).

Longen argued that it violated the ADA to terminate him based upon an incident that occurred during non-working time, off of company premises. In concluding that the agreement should be enforced, the court noted that the agreement was one Longen entered into freely and it included valuable consideration - - Longen would not be terminated as consideration for signing the agreement. The court stated that the ADA addresses restrictions on an employer's rights to impose limitations on an employee's consumption away from work. In this instance, Longen's acceptance of the last chance agreement proposal resulted in a restriction that Longen imposed upon himself. Therefore, his breach of the terms of that agreement resulted in his termination and did not violate the ADA.

PRESSURE ON EMPLOYEES AT WORK WILL CONTINUE TO INCREASE, ACCORDING TO SURVEY

A recent survey of 10,000 employees from 700 organizations by the firm RainmakerThinking concluded that we have the following to look forward to in the future: Work will be more demanding, employment relationships will be more transactional and short term, employees don't believe in long term rewards and thus have a "what will you do for me now or soon" approach, and

supervising employees will become more complex, requiring greater skill and training.

Their survey also shows that employees will become more expendable, benefits will diminish and "everything" will worry employees, including politics, war, terrorism and natural disasters. The report concludes that short term incentives will be among the best approaches to improve morale, productivity and employee retention.

RESPONDING TO OSHA CITATIONS

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.

Upon receipt of an OSHA citation employers often ask questions similar to the following: Is seeking relief or challenging citations worth my time? Is there a risk that an appeal may only make matters worse, cost me money, and get me on OSHA's " bad employer" list?

In most cases employers should strongly consider availing themselves of the opportunity to have an informal conference to discuss the citation with OSHA. Other than time, there is little for one to lose in doing this. It gives the employer a chance to make the statement that the company takes safety issues seriously and cares about the welfare of its employees. Secondly, there is the possibility that OSHA might be persuaded to make changes to the citation that would make it acceptable to the employer. After all, the agency has an interest in settling cases, where possible, to avoid the time- consuming process of preparing cases for a formal hearing. Settlements also assure speedier action to eliminate hazards, since a contested case allows the cited hazards to go uncorrected until a decision and final order is rendered by the Occupational Safety and Health Review Commission. Finally, a meeting with OSHA may give the employer a better understanding of their basis for the citation and help in deciding whether a notice of contest should be filed.

It is unlikely that OSHA will view an employer's appeal or genuine disagreement negatively if it is coupled with evidence that there is no intent to compromise employee safety. This should include, when possible, demonstrating what is being done to address OSHA's concerns as raised in the citation

Informal conferences should be scheduled very soon after receipt to allow time for follow-up negotiation before the 15-day contest period expires. OSHA will expect that an informal conference will be held jointly with representatives of management and labor where there is a recognized employee bargaining unit. Separate meetings may be allowed if either management or labor objects to a joint meeting.

Should an informal conference fail to resolve an employer's objections to a citation, a formal notice of contest may be filed. Your contest must be in writing and should be directed to the OSHA area office that issued the citation. This letter should state clearly your desire to contest all alleged violations, abatement dates and penalties, or specify if only certain items are being challenged. This notice must be filed with OSHA within 15 days from an employer's receipt of the citation. Failure to meet this time period may cost you your opportunity to have a hearing. (This day-count does not include the day of receipt, week-end days or federal holidays.) The OSHA area director will forward your notice of contest to the Review Commission, an independent agency, that will assign the case to an administrative law judge. A time for the

hearing will be set, usually at a location in proximity to the employer's workplace

After the case is received by the Department of Labor attorneys in the designated Office of the Solicitor, another opportunity to settle the case may be available. The assigned attorney has 20 days to file a complaint in the case. Terms of settlement acceptable to the employer may be presented during this period.

If the case continues to a hearing by the assigned Administrative Law Judge, his or her decision may be appealed to the three-member Review Commission by either party. Subsequently, a ruling of the Commission may be appealed to the U.S. Court of Appeals for the circuit in which the case arose or where the employer has its principal office.

COMMON SENSE APPROACHES TO HANDLING ADA MATTERS

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.

In keeping with his New Freedom Initiative to advance the employment of individuals with disabilities, President George W. Bush recently proclaimed October, 2003 to be the National Disability Employment Awareness Month. According to the President's Proclamation this should be a time when both private and public employers showcase the abilities of people with disabilities, and make a concerted effort to remove barriers to employment. This year's national theme is **"***America Works Best When All Americans Work."*

While most employers are philosophically in harmony with the President's, initiative, many small employers find that compliance with the somewhat complicated provisions of Title I **(**the employment section) of the *Americans With Disabilities Act, of 1990***,** (the ADA) can be an exasperating experience. They perceive these provisions to be both costly and time consuming. However, this needn't be so. Employer's can be pro-active in dealing with disability matters by using a common sense approach to the basic issues involved in hiring and providing reasonable accommodations, where required.

As a prelude to our discussion of how to approach these matters it might be well to review the basic provisions of the ADA, itself.

Title I, the employment section of the Americans with Disabilities Act of 1990, makes it unlawful for an employer to discriminate against a qualified applicant or employee with a disability. The ADA applies to private employers with 15 or more employees and to state and local government employees. Under the Act, an individual with a disability is one who: (1) has a physical or mental impairment that substantially limits a major life activity, (2) or has a record or history of a substantially limiting impairment, or (3) is regarded or perceived by the employer as having a substantially limiting impairment.

Assuming for the moment that an applicant or employee falls within one of the above disability categories (volumes have been written on the interpretation of these categories alone), the applicant or employee must also be qualified, the same as any other applicant or employee**,** in order to obtain the protections of the ADA. This simply means that the applicant or employee must meet the employer's job requirements pertaining to education, experience, training, special skills or licenses. Additionally, the applicant must be able to perform the essential functions of

the job with or without reasonable accommodation. However, the employer does not have to provide a "reasonable accommodation" if it would create "undue hardship." Undue hardship has been defined as significant difficulty or substantial expense to the employer.

In a nutshell those are the basic provisions of the ADA. Obviously, there will continue to be much litigation over the application of those basic provisions to any given set of facts. Keeping the above in mind consider the following suggested proactive measures to take with respect to the hiring process in dealing with disabled applicants:

1. Anticipate the likelihood that some individuals with disabilities will apply by including on the application itself a statement that a reasonable accommodation will be provided, if requested, in order to complete the application process.

2. Encourage the applicant to suggest the kind of accommodation that will be needed and then make a determination as to whether or how it can reasonably be provided.

While an employer is required under the ADA to provide reasonable accommodation during the application process, an employer can refuse to provide an accommodation if it would cause undue hardship. That is, if it would be too difficult or too costly. What is too difficult or costly, of course, is a matter of judgment depending upon the employer's size and financial ability. Employers should act in good faith in determining whether a reasonable accommodation could be provided. If company resources permit, the matter of coordinating all reasonable accommodations should be assigned to one person to ensure consistency.

In the next issue some proactive measures for providing reasonable accommodations beyond the application process will be discussed.

FAMILY AND MEDICAL LEAVE ACT DEVELOPMENTS

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.

The Family and Medical Leave Act (FMLA) continues to cause employers significant problems. A DOL survey found that 35 million employees had taken FMLA leave, since its inception in 1993, with more than one-half of those using the leave because of their own serious illness. Eighteen percent took leave to care for a newborn child, thirteen percent to care for a seriously ill parent and twelve percent to care for a seriously ill child.

Even though the act is now ten years old there continues to be much litigation regarding the application of the law in certain situations. In some instances the employer prevails while in other situations the employee has prevailed. Listed below are results of some recent decisions that may provide you with some guidance regarding how you should treat employees who may be entitled to FMLA leave.

1. Last year the U. S. Supreme Court ruled that an employer's failure to notify an employee in writing that time the employee took off for a serious health condition did not entitle the employee to more than 12 weeks of leave during a 12-month period. While this decision invalidated some of the DOL regulations, the court did not invalidate the portion of the regulation that requires employers to notify employees

that their leave will be considered FMLA leave. The Department of Labor has indicated they are going to issue revised regulations to conform with the Court's decision. However, as they currently involved an attempt to revise the Fair Labor Standards regulations related to the exemption of Executives, Administrative, Professional and Outside Sales employees, DOL has apparently put the FMLA regulations on hold.

2. On October 9 the Department announced that it is withdrawing the Birth and Adoption Unemployment Compensation Rule of 2000. This rule allowed state agencies to us unemployment insurance funds for the partial wage reimbursement of any employee on leave for the birth or adoption of a child although no states were making use of the rule.

3. Recently the U. S. Sixth Circuit Court of Appeals ruled than an employee cannot be required to perform work while on FMLA leave. The employee had been granted FMLA leave for his own serious illness. While on leave the employee was contacted for information about his accounts and his work. When the employee refused to provide the information he was terminated. A District Court jury awarded the employee $130,000 in damages and interest plus attorney fees and costs of over $90,000. In addition, the appeals court stated that he could also be entitled to liquidated damages up to the amount of his damages. (Arban V. West Publishing Corporation).

4. This month the Sixth Circuit also ruled for an employee who was denied FMLA leave because he failed to give three days notice as required by a company policy. The employee was involved in a motorcycle accident that required treatment at a hospital emergency room. He was given a note that he needed to be off for three days. The need to be off was extended by another doctor and the employee called in sick every day. When he returned to work he received "progressive counseling" because his attendance had fallen below 98%. After some additional leave related to the accident the employee was terminated. The case has been remanded for further proceedings**.** Note: While the FMLA regulations require a 30 day notice by the employee when requesting leave, such notice is not required in the case of unforeseen circumstances. (Calvin v. Honda of American Manufacturing, Inc.)

Not all current cases have gone against employers. Recently there have been several decisions where employees were denied FMLA protection because of illegal activity or fraud. An Ohio court stated the termination of an who threatened to blow up the employer's establishment did not violate the FMLA. Also, A Texas court held the discharge of a worker who had run up more than $10,000 of personal charges on a company credit card was not retaliated against for using FMLA leave. In a third case a California Court of Appeals up the discharge of an employee who played golf while on FMLA leave. Another court upheld the performance related demotion of an employee the day she returned from maternity leave.

The Department of Labor may at some point revise the FMLA regulations and there are also some bills pending in Congress to amend the Act. Employers should try very diligently to ensure they are complying with the FMLA. In order to limit their liability it is recommended that employers.

- review their employee handbook to make sure that it contains the required information regarding the FMLA;
- establish a procedure where the Human Resources Department is made of aware when an employee requests (takes) leave that may be covered under the FMLA so that timely written notices may be provided to employees; and
- provide training for managers and supervisors regarding the requirements of the FMLA.

If you have questions regarding the proper application of the FMLA please call our office.

DID YOU KNOW . . .

. . . that employees may proceed with a wage and hour claim that frequent interruptions during their meal time converts meal time into working time? *Beasley v. Hillcrest Medical Center,* (10th Cir. October 9, 2003). Employees received an unpaid lunch break of a half an hour per day. However, nurses and technicians alleged that their break was frequently interrupted to provide patient care, respond to patient call buttons, phone calls, watch monitors or assist with new admissions. Although minimal interruptions do not nullify an unpaid break, the court concluded that the parties may proceed with their claim that the frequency and duration of the interruptions converted the entire half hour break into "working time."

. . . that average first year wage increases of negotiated agreements in 2003 declined compared to 2002? The Bureau of National Affairs on September 29 issued a report that the average first year wage increase for contracts negotiated this year was 3%, compared to 3.5% in 2002. Manufacturing increased 2.3% (2.9% in 2002), non-manufacturing increased 3.7% (4.2% in 2002) and construction increased 2.7% (4.4% 2002).

. . . that three full consecutive days of incapacity are required under FMLA, not partial incapacity? *Russell v. North Broward Hospital*, (11th Cir. October 2, 2003). The employee argued that "three consecutive days" under the FMLA did not require three full 24 hour periods. In rejecting that argument, the court said that "courts and juries would continually confront confounding issues about how much incapacity on a given day is enough for that day to count toward the regulatory requirement. Are 5 hours enough? Fifty minutes? Fifteen minutes?" Three consecutive twenty-four hour periods of incapacity is required, according to the court.

. . . that the Department of Labor on October 3 announced a change regarding union financial reporting requirements? The change requires unions to report annually their financial status by functional categories, including political activities and lobbying, administration, strike benefits and representational activities. According to Labor Secretary Chao, "In this era of accountability and transparency, updating the financial reporting requirements will empower and protect workers who trust their unions to represent their interests." Previous drafts of the report required greater specificity regarding the amount of money spent on union organizing; the final draft does not.

. . . that the Teamsters owe a former business agent $400,000 for terminating him after he announced that he would run against local union officers? *Shales v. International Board of Teamsters Local 300*, (M.D. Ill. Aug 27, 2003) Shales was a business agent for the local until 1997, when the president of the local fired Shales after Shales announced that he would run against the president in the

upcoming election. Shales lost the election by three votes. In upholding a jury award for $400,000, the court concluded that the local's actions were intended to "deliberately hinder his campaign and, therefore, to deliberately suppress dissent." The court also ordered the union to pay Shales's attorneys fees, after noting that the union destroyed key documents concerning Shales, perjured themselves during union hearings regarding Shales and abused union processes and remedies.

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

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