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

Employment Law Bulletin

To Our Clients And Friends:

Whether it is the case of school children saying "under God" in the Pledge of Allegiance or Alabama's former Chief Justice denying a court order to remove a three ton monument of the Ten Commandments, religion is a highly charged subject in our country. **The recent case of *Millazzo v Universal Traffic Service, Inc.* (D. Colorado, Oct. 20, 2003) is a good (and expensive) example of what not to do regarding the expression of religious views or beliefs in the workplace.** A Colorado jury awarded two employees $750,000 in damages for religious discrimination and a hostile work environment based upon religion. The following are examples of actions by the company's owner that resulted in this award:

- encouraging employees to contribute to religious organizations and asking them questions about their religious contributions;
- sending tapes to employees of himself praying and reading scripture and telling employees they needed to review those tapes and prayers;
- after two of the plaintiffs missed a corporate function in which the owner gave a religious prayer, he sent the employees a copy of the prayer and asked them to recite the prayer, sign it and return it to him;
- telling one of the plaintiffs to forego cancer surgery and instead to pray harder;
- encouraging employee prayer in the company's mission statement and telling employees to pray over the mission statement; and
- telling employees that he "didn't care" if his religious views or beliefs offended others in the workplace.

The court stated that the president "saturated" the workplace with his religious views and beliefs and his intolerance of the views and beliefs of others was "reprehensible." Furthermore, the company exhibited "a total indifference and reckless disregard to [its] employees."

Religious issues in the workplace can be emotionally divisive and create other issues for the employer. For example, if an employer permits a group of employees to use a conference room for religious purposes, how will the employer answer employee requests to use the same facility for other purposes, such as to talk about unionization or other legally protected, concerted activity? If employees voluntarily participate in bible study or prayer meetings at work, and one or more of the participants is a supervisor or manager of those who do not participate, what are the implications regarding how the non-participants are treated?

Employers should apply the same principles regarding sexual, racial and other workplace harassment to preventing and responding to harassment based upon religion. An employer's workplace harassment policy and training should include all protected classes, such as religion, so that employees know (1) what may be considered harassment, (2) what they should do about it and (3) the employer's response when it becomes aware of the possible harassment.

EMPLOYEE'S FAILURE TO COOPERATE TERMINATES EMPLOYER'S REASONABLE ACCOMMODATION OBLIGATION

Employers engaging in a reasonable accommodation analysis have a right to require that the employee participate in the process and, if the employee fails to do so, suffer the consequences. This principle was highlighted recently in the case of *Allen v. Pacific Bell* (9th Cir., November 11, 2003).

The employee, a service technician, sued the company alleging that the company failed to reasonable accommodate his disability. The employee asserted that the only accommodation possible involved restricting him from climbing telephone poles or ladders. Allen provided medical substantiation supporting this position, so the employer pursued transferring Allen to another position. One of the positions paid less than the service technician job, but the other job that paid the same required that Allen pass a keyboard test.

Allen asserted that he had failed keyboard tests before and to take them again would be fruitless. He also said he had further medical substantiation that he could return to his service technician position without accommodation. The company asked Allen to submit additional medical information supporting this position. Allen provided no supporting medical information and refused to take a keyboard test for another job. He was terminated and sued.

In rejecting Allen's failure to accommodate claim, the court stated that "because Allen failed to cooperate in the job search process, we cannot say that Pacific Bell failed to fulfill its interactive duty" regarding reasonable accommodation. Remember that an employer has the right under the ADA to request medical information related to an employee's assertion of a disability-related restriction or the need for accommodation. An employee who fails to comply with an employer's lawful request for this information may face adverse action; including termination.

OSHA TIP: MEASURING OSHA ENFORCEMENT

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.

The numbers are in for OSHA's Fiscal Year 2003 enforcement program. Secretary of Labor Elaine Chao released the annual statistics for the department's program, which includes those for OSHA, on November 18, 2003. In doing so, she noted that OSHA's vigorous enforcement program, which has emphasized targeting "bad actors," and its compliance efforts have created safer work sites.

While OSHA has consistently voiced the need for outreach programs to provide training and assistance to employers, the agency has often stressed that its foundation is "strong, fair and effective" enforcement. The just-released figures suggest that significant gains in voluntary programs such as "alliances" have not come at the expense of enforcement activities.

In the fiscal year ending on September 30, 2003, federal OSHA conducted 39,817 inspections, which represents a 6% increase over the previous year. This increase is attributed, in part, to a significant increase of 9.2% in programmed inspections. These are inspections OSHA targets towards high-hazard processes and industries, as well as specifically identified sites which are experiencing high injury/illness rates.

In addition to conducting more inspections, the agency points to finding an increasing number of violations during these visits. **In 2003, a total of 83,539 violations of OSHA's standards or the general duty clause were cited. This represents a 7.6% increase over 2002 and a 10.2% increase over the past five years.** Approximately 60,000 of these alleged violations were considered to be serious which reflects an 11.2% increase over last year. The numbers of both willful and repeat violations, which bring substantial monetary penalties, increased considerably in this period.

Is it paying off? It might not be absolute proof of a cause-effect relationship, but the numbers and trends are positive. **The most recent fatality count of 2002 finds that the number of workplace facilities fell by 6.6% and the rate of fatal injuries fell to 4.0% per 100,000 workers. Both are the lowest figures on record.**

The occupational injury/illness rate in 2001 (most recent data available) fell to 5.7 cases per 100 workers. This is the lowest level since this information has been collected and reflects a drop from 6.1 cases per 100 workers in the year 2000.

Falling injury/illness rates don't mean that OSHA will lessen its enforcement efforts. The agency has committed to conduct significantly more enforcement inspections in this current fiscal year of 2004. If you are a candidate for an OSHA inspection, you might visit the agency website at www/osha.gov and view their posting of the most frequently cited standards for fiscal year 2003. For general industry (1910 standards), the rank order is slightly changed by the listed standards are identical to the previous year. Conditions involving hazard communication (right to know), lockout-tagout, respirators/personal protective equipment, electrical , forklift to know), lockout-tagout, respirators/personal protective equipment, electrical equipment, forklift operator training, machine guarding, and blookborne pathogens continue to lead in frequency of citations and penalties.

EEO TIP: A CLOSER LOOK AT THE HIRING PROCESS UNDER THE ADA

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.

Given the Supreme Court's holdings in a series of cases in 1999, namely *Sutton v United Air Lines* and *Albertson's v Kirkingburg,* together with several recent cases, one could get the impression that disability as a basis of discrimination has been severely weakened. However, that would be a false impression. While the

Supreme Court's decisions referred to above definitely clarified some issues in favor of employers, the substantive provisions of the ADA, if not followed, could be a stumbling block rather than stepping stone in building a lawful, harmonious employment environment.

For example, recent EEOC statistics pertaining to the ADA show that the agency favorably resolved approximately 9,200 ADA charges in fiscal years 2001 and 2002, and obtained over $97.8 million in benefits for the charging parties. An additional $14.2 million in back pay and compensatory damages was obtained through litigation. Hence the enforcement provisions of the ADA are still alive and well.

Last month in keeping with President G. W. Bush's *New Freedom Initiative* on behalf of persons with disabilities, some proactive tips for providing reasonable accommodation during the application phase of the hiring process were discussed in this column. This month we will address some related questions which arise during the hiring process.

Questions Frequently Asked by Employers

Two of the most frequent questions asked by employers pertaining to the hiring process are as follows:

1. *Which applicants or employees with disabilities are actually protected by the ADA and entitled to a reasonable accommodation*?
2. *At what point is it lawful to discuss an applicant's or employee's disability, and who should initiate the discussion?*

Since volumes could be written in answer to each of these questions, it is stating the obvious to say that the information in this article could not be more than a basic summary of the legal concepts underlying the ADA.

Whom does the ADA Protect ?

Broadly speaking, the ADA protects only *qualified applicants or employees* with a disability who can perform the essential functions of a job with or without reasonable accommodation. Usually, the essential functions of any given job, themselves, will dictate whether or not a particular type of disability can be reasonably accommodated.

It should also be mentioned that the ADA protects a person who may or may not have an actual disability, but is regarded as having one. For example where an employer assumes that a person is substantially impaired merely on the basis of fears, myths or stereotypes pertaining to a facial disfigurement, withered arm or hand, or even a history of some disease such as cancer.

Accordingly, in order to be proactive an employer should be objective and open-minded in assessing an applicant's or employee's qualifications during both the pre-offer and post-offer stages in the hiring process.

> **EEO TIP**: An employer does not have to hire an applicant with a disability over a more qualified applicant without one. The objective of the ADA is to provide equal access and equal employment opportunities to persons with disabilities not to bestow an unfair advantage. However, if a charge is filed, the EEOC will look more closely at a workforce that is devoid of persons with disabilities the same as they would if a workforce consisted of only one sex or race.

When is it lawful to discuss an applicant's or an employee's disability and who should initiate the discussion ?

Usually, an employer will have a number of opportunities to discuss an employee's disabilities during the various stages of the hiring process. Under the ADA an employer generally is not obligated to provide a reasonable accommodation unless an applicant or employee requests one or the need for one is apparent to the employer. During the pre-offer phase, as stated in last month's ELB Article, an

employer may request certain basic information about the disability if the applicant requests an accommodation that would significantly alter the process, or if such information would be necessary to provide an appropriate accommodation.

> **EEO TIP**: Although direct questions concerning an applicant's disability cannot be asked during the pre-offer stage, an employer can ask a wide range of non-medical questions for purposes of determining the applicant's qualifications for the job under consideration.

For example during the pre-offer stage an employer may ask questions concerning the applicant's educational background or training in order to acquire the skills necessary to perform the essential functions of the job. Of course the essential functions should be described. Additionally, an employer may ask about the applicant's time and attendance record at his/her previous job. In general any non-medical questions may be asked so long as they do not require an answer that would spotlight a disability.

During the post-offer stage an employer may ask disability-related questions and conduct medical examinations <u>if such questions and/or medical examinations are required of all other applicants in that job category.</u> In other words an employer cannot ask an applicant with an obvious disability questions that would not be asked of all other applicants for the same type of job in question.

> **EEO TIP:** An employer may withdraw an offer if the employer has a valid, objective basis for believing that an applicant with a disability either cannot perform the essential functions of the job, or that such applicant, if hired, would pose a direct threat to himself or others. However, the employer should be able to prove that reasonable accommodation could not resolve the performance problem or remove the direct threat in question.

Next month's article will be devoted to a discussion of what constitutes a reasonable accommodation and how far an employer must go in providing one. Inherent in this discussion is the issue of "undue hardship" and some tips on how to measure it**.**

WAGE AND HOUR TIP: EXEMPTIONS LEGISLATIVE AND LITIGATION UPDATE

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 there are always several "hot" issues in the Wage Hour realm at any time, the number one issue is "exempt vs. nonexempt" as it relates to the so-called white collar exemptions. In March 2003, the Department of Labor published proposed new regulations that would make significant changes in the requirements for these exemptions. Because there are some many major differences between the current regulations and the new proposal there has been a great deal of debate between employer and employee organizations. The Senate attached an amendment to the Department of Labor (DOL) FY 2004 appropriation bill to prohibit the proposed changes. The House of Representatives also passed a non-binding resolution instructing the members of the Conference Committee to insist that the proposed regulations not be implemented. Over the weekend of November 22, there were published reports that those opposing the revisions had withdrawn their objections at this time so the DOL appropriation bill could be passed. In an interview during the week of November 17, the Wage Hour Administrator stated they were proceeding with their review of the many comments but she did not give a date when they expect to issue the revised regulations.

Employers must still follow the requirements that are set forth in the current regulations and ensure they are correctly classifying employees. Failure to do so can result in a substantial liability. For example, in November 2003 a U. S. District Court in Oregon ruled that certain Claims Adjusters employed by the Farmers Insurance Group were nonexempt while others were exempt. The case concerns some 2500 current and former adjusters in seven states. The firm employed three categories of adjusters:

- "Liability" adjusters handle cases involving bodily and personal injury and death with approximately 20% of the cases they handle resulting in litigation. The court found that these adjusters exercised considerable discretion and independent judgment and thus were exempt employees.
- The second category of adjusters were the "auto physical damage" adjusters. In this case the court said "vehicle damage is finite and limited to the value of a known entity from standard sources" and therefore, the choices of the adjusters are limited. Consequently, these employees did not exercise the requisite amount of discretion and independent judgment to be exempt.
- The third category was the "property claims adjusters." Apparently some of these adjusters had a very limited amount discretion while others had the authority to settle large claims, such as those relating to a destroyed house. In the case of these employees, the court held that those adjusters who handle property claims for more than $3000 per month were exempt while those who handled claims for less than $3000 per month were nonexempt.

Another significant portion of this ruling dealt with the "willfulness" of the violations. Farmers Insurance had been sued over the exemption status of its claims adjusters in California and the court there found the adjusters to be nonexempt in 2001. As a result the company paid more than $90 million in back wages. After this ruling Farmers instituted a new policy limiting claims representatives to 40 hours per week unless they obtained approval from their supervisor. However, management in many instances ignored the policy and some of the adjusters were found be working up to 60 hours per week. Consequently, in the current case the court found the firm had willfully violated the FLSA which means the firm will be liable for back wages for a three year period.

Employers should remember that in order for the employee to be exempt he/she must meet **all** of the criteria that are set forth in the regulations. Failure of the employee to meet any part of the regulations makes the employee non-exempt and creates a potential liability for the employer. Consequently, employers should be very careful to ensure that the employee meets all of the requirements for the exemption(s) that are being claimed.

Wage Hour Announces the Results of Enforcement Efforts during FY-2003. The agency press release stated that during the year they collected back wages exceeding $212 million for almost 350,000 employees. This back wage figure is up 21% from the previous year and is an 11-year record. Employers should be aware that they not only have the potential for private litigation on behalf of employees for violating the Fair Labor Standards Act but also Wage Hour has the authority to make investigations to determine if the employer is complying with the Act.

DID YOU KNOW . . .

. . .that Senators Kennedy and Miller on November 13 proposed legislation to permit union recognition based on signed authorization cards? Known as the "Employee Free Choice Act," the bill would certify the union as the employees' bargaining

representative if a majority of employees signed cards. If less than a majority signed cards, a union could still request a secret ballot election. The bill would also provide that if the parties do not bargain to agreement within 90 days after certification, the matter would be referred to binding arbitration. Remember that when organized labor does not succeed in the workplace, it focuses on changing the law in Washington.

. . . that a "bagel attack" was an incident of workplace violence justifying termination? We just had to share this one with you. Several witnesses alleged that employee Liberty Argueta repeatedly hit a coworker on the forearm with a bagel, causing swelling. Liberty was terminated and alleged it was due to her Hispanic background. According to the court, "the relevant question is not what happened, but rather what the decision makers believed happened. Argueta presents no evidence suggesting that those charged with the decision to terminate her harbored any discriminatory animus whatsoever."

. . . that according to a survey conducted by the Mercer Human Resources Consulting Group, employers plan to scale back raises for 2004? In April, Mercer's survey concluded that pay raises in 2004 would average 3.5% now the survey indicates the figure is 3.3%. The number one factor contributing to the decline is the increase in healthcare costs.

. . . that time lost due to "aches and pains" cost employers $61.2 billion last year, according to the Journal of the American Medical Association? The Journal published its report on November 12, 2003 after 2,500 surveys per month were conducted during the past year. According to the report, "52.7% of the workforce reported having headache, back pain, arthritis, or other musculoskeletal pain in the past two weeks. Overall, 12.7% of the workforce lost productive time in a two week period due to a common pain condition; 7.2% lost two hours a week or more of work." The report concluded that productive time lost due to pain was four times greater than productive time lost due to absenteeism.

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