"Your Workplace Is Our Work"®

December 2003
Volume 11, Issue 12

Inside this Issue

Lehr Middlebrooks Price & Vreeland, P.C.
2021 Third Avenue North
Birmingham, AL 35203
205-326-3002

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

Employment Law Bulletin

To Our Clients And Friends:

We hope your new year is filled with peace, good health and, yes, prosperity. We are encouraged about the optimistic reports we hear from clients throughout the country covering several sectors of our economy. Resolve for 2004 to keep your workforce informed regarding business developments, such that employees feel a greater sense of belonging to your organization.

IS A "CODE OF BUSINESS CONDUCT" AN EMPLOYMENT CONTRACT?

The answer "No" to this question by the Supreme Court of West Virginia cost the plaintiff a $378,649 damages award. (*Younker v. Eastern Associated Coal Corporation*, Dec. 3, 2003). The principles of this case are instructive for employers nationally.

The company's code of business conduct prohibits retaliation for reporting business misconduct. Vice President of Operations Forrest A. Younker participated in an investigation of industry corruption by answering questions posed by an agent of the Internal Revenue Service and a state trooper. During the course of their questioning, Younker admitted to a sexual relationship with a prostitute who had been paid by a vendor of Younker's employer, Eastern Associated. He claimed that the code of conduct protected him from termination after he disclosed the fact of the relationship. In reversing the lower court's award, the Supreme Court wrote that the business conduct code states that it "does not constitute a comprehensive, full or complete explanation of the laws which are applicable to the Company and its employee nor does it contain all applicable policies and basis for discipline or discharge." This language incorporated by reference the employer's right to treat Younker as an "at-will" employee. Furthermore, although self-reporting misconduct was protected under the policy, the self-reporting did not exempt the employee from the consequences of his conduct.

As employers adopt codes of business and personal conduct, be careful that those codes do not unintentionally extend rights to employees that create an exception to the "at-will" relationship. Determine whether an employee who "confesses" to his or her own misconduct will not be immune from the consequences for that misconduct. Distinguish in the policy that situation from one where an employee reports the misconduct of another.

FREE SPEECH NOT SO FREE, RULES COURT

An employee on his own time and at home was involved with developing white supremacist websites and businesses. The employee made the employer aware of his activities, which included selling swastika flags, music albums with titles such as "The White Race Will Prevail," "Keep the Hate Alive," and "New Racism," and which referred to Adolph Hitler as the closest thing to a god. Although the employee's job performance was satisfactory, the employer terminated his employment because his outside activities directly contradicted "our core values of respect for all people." The employee sued, arguing that his termination violated public policy and his First Amendment rights. *Wiegand v. Motiva Enterprises*, (D. NJ, Dec. 16, 2003).

Employee Wiegand worked as a supervisor at a convenience store, where he daily was in contact with customers of various races, religious beliefs and backgrounds. In granting the employer's motion for summary judgment, the court concluded that First Amendment free speech rights do not apply broadly to the actions of private sector employers regarding their workforce. Furthermore, "**defendant, as a private employer, had a very strong interest in regulating the speech of their convenience store supervisor to insure that it personified their values of respect for all."** The court also stated that "plaintiff did not simply speak on a social issue; instead, he disseminated hate speech for commercial profit and in circumstances where his employer had a strong interest in regulating any appearance of discrimination or racial bias toward fellow employees whom plaintiff supervised and toward customers whom he served." The court added that there was no public policy right to remain employed in a customer service and employee supervision capacity while also promoting, selling and disseminating materials espousing hate and intolerance.

OSHA TIP: ARE YOUR SAFETY RULES ADEQUATE?

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.

One affirmative defense that an employer may raise in contesting an OSHA citation is to show employee misconduct. The burden of proof to show that the violation of an OSHA rule was due to "unpreventable employee misconduct or isolated event" rests with the employer. It must be shown that the cited violation was unknown to the employer **and** was in violation of an adequate employer work rule that had been "effectively communicated" and "uniformly enforced".

An example might be where an OSHA inspection finds a required guard missing from a machine but facts may exist that dissuade OSHA from issuing a citation or being able to sustain one if issued. Important to the employer would be the ability to show that there was a rule that equipment was not to be operated without all guards attached, perhaps signs near the machines emphasizing this and evidence that this rule is enforced. Also it should be shown that the guard had not been removed for a significant period of time. If the

guard can't be located or if it's on the floor covered with an inch or so of dust, the employer may have difficulty prevailing on a misconduct claim.

Failure of employees to wear required personal protective equipment has often led to employer claims of employee misconduct. For instance, OSHA's observing employees not wearing head protection on a multistory building site might lead to the claim of misconduct. The site superintendent could note that safety helmets are required and provided, and also point to posted signs saying they must be worn. A misconduct claim will again be hard to sell if about 19 of 25 workers on the site aren't wearing helmets while working within full view of the superintendent.

While most misconduct claims arise from circumstances such as the above, others may involve horseplay or indulging in such activities as taking a forklift truck for a joy ride. Another side of this emerges when an employee takes it upon himself/herself to help out in an area or on a job that is unassigned and not part of their duties. This occasionally ends in a tragic accident when this volunteer task includes hazards for which the employee is untrained.

Regardless of exposure to hazards, absence of assigned duty or training, OSHA will not issue a citation where an employee engages in efforts to rescue a fellow employee. The agency issued an interpretive rule in 1994 saying, "It is not OSHA's policy to regulate every decision by a worker to place himself at risk to save another individual."

The OSHA act places the duty upon employees to comply with OSHA rules and the employer's rules. An employer should have in place rules they need to fulfill their duty to provide a safe worksite. It is unreasonable to expect an employer to anticipate everything an employee might do apart from assigned duties, but one rule should insist that they not engage in activities which require training they have not had. Remember that you should also be able to demonstrate that your safety rules are enforced.

EEO TIP: REASONABLE vs. UNREASONABLE ACCOMMODATIONS

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.

What makes an accommodation reasonable?

Much depends on the nature of the job in question, the type of disability that must be accommodated and the means of the employer to provide it without undue hardship. Generally speaking for an accommodation to be "reasonable" it must effectively solve the problem of providing an equal employment opportunity for the applicant or employee who requests one.

There could be any number of accommodations that would allow individuals with disabilities to be productive employees depending on the job environment or work requirements. The following types of modifications have been found to satisfy the test of reasonableness:

- **Modifying Equipment.** Providing or allowing the use of alternative equipment, e.g. handle extensions, a special chair or computer device.
- **Minor Workplace Changes.** For example raising or lowering a work bench or table.
- **Minor Job Restructuring.** Shifting minor tasks to other employees or changing the order in which the work flows.
- **Modifying Work Schedules.** Allowing for periodic breaks, allowing for medical leave if necessary, or adjusting arrival or departure times.

- **Working At Home.** Allowing an employee to perform the essential functions of the job at home through the use of computers, internet access, telephones and fax machines. (Only certain types of jobs would allow this type of accommodation).

The above listing is by no means exhaustive. The accommodations available are limited only by the imaginations of the parties.

EEO TIP: An employer is not necessarily obligated to provide the exact accommodation requested by an employee or applicant, but only one that would work under the circumstances. For example an employer may chose an accommodation which is less expensive than the one requested so long as it would effectively solve the problem.

When does an Accommodation become Unreasonable ?

Depending upon an employer's size and resources, some of the accommodations listed above could be costly. This raises the question of ***What constitutes undue hardship?*** In a nutshell **"undue hardship**" under the ADA is any accommodation that would result in **significant difficulty or expense**.

EEO TIP: Undue hardship refers not only to financial difficulty, but to otherwise reasonable accommodations that are unduly extensive, substantial, disruptive, or those that would fundamentally alter the nature or operation of the business.

This is also a somewhat vague standard in that what may be significant or substantial to one employer would be insignificant to another. Hence, employers must take a common sense approach to the matter and objectively assess on a case-by -case basis whether a requested accommodation would cause undue hardship on that particular business. In general there are some things that an employer does not have to do. For example an employer **does not have to provide an accommodation :**

- **That includes personal use** items that would assist the employee **both on and off the job.** E.g. eyeglasses, a wheelchair or prosthetic limb. (However, if the item **is specifically designed to meet job-related needs** and serves a dual purpose, it may still be a reasonable accommodation.)
- **That removes or alters a job's essential functions.**
- **That reduces or lowers production or performance standards**
- **That would jeopardize the safety of himself or others, or violates the rules of conduct predicated on business necessity.**

Some Interesting Information on Assessing the Cost of Accommodations

According to the EEOC, most accommodations are not very expensive. The EEOC claims that:

- One-fifth of all accommodations cost nothing
- Slightly more than half cost between $1 and $500 dollars.
- The median cost is about $240.
- Technological advances continue to reduce the cost of many accommodations.
- Some employees are willing to provide their own forms of accommodation if asked.

EEO TIP: To offset the cost of accommodations certain tax credits are available under Internal Revenue Code Sections 44, 51 and 190. Consult your tax accountant to determine if your firm is eligible.

What To Do If an Accommodation Is Requested ?

- Discuss with the employee the type of accommodation needed. Be interactive but don't pry into the nature of the disability, itself. That will probably be evident from the request.
- Document the request and your response. Remember, however, that under the ADA, only an oral request is necessary.
- Keep such accommodation records, if made, strictly confidential and separate from other personnel files.

WAGE AND HOUR TIP: WAGE HOUR DIVISION ACTIVITIES DURING FY 2003

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.

On November 18, the U.S. Department of Labor ("DOL") published information regarding its activities during the previous year. Most notable is the fact that they collected over $200 million in back wages for almost 350,000 employees. Both figures showed increases of more than 20% over their activities in the previous year. In addition, they assessed civil money penalties of nearly $10 million for child labor violations and/or for repeat or willful violations of the minimum wage and overtime provisions of the FLSA.

As in the previous year they completed approximately 40,000 cases while receiving more than 31,000 complaints. The figures indicate that violations were found in almost 70% of the cases that were concluded during the year. While DOL administers numerous statutes some 80% of their completed cases were Fair Labor Standards Act cases and approximately 10% were Family and Medical Leave Act cases.

When deciding how to use its resources, DOL targets certain "low wage" industries and expends a significant amount of time this area. Nearly a third of DOL's resources were spent in these areas which include agriculture, day care, restaurants, garment manufacturing, guard services, health care, hotels and motels, janitorial services and temporary help employers. These employers were found to have underpaid some 80,000 workers almost $40 Million in 13,000 separate cases.

Employers were found to have improved in their efforts to comply with the child labor requirements of the Act in that 25% fewer minors were employed in violation during the current year that in the previous year. More than 7000 minors were employed contrary to the child labor requirements and DOL assessed civil monetary penalties of $5 Million against employers. Penalties for violations of the child labor laws can be as much as $11,000 per minor. Also, the administration has proposed to raise the amount to $100,000 in its FY 2004 budget. Since Congress has not passed a Department of Labor appropriation for this year it is not known if the final bill will contain this provision.

Another statute administered by DOL is the Family and Medical Leave Act which continues to cause employers a large number of problems. As in the previous year, DOL received approximately 3500 complaints under the FMLA. However, the number of employers found to have been in compliance increased from 1766 in FY-2002 to 1911 in the current year. Thus, it appears that employers are doing a better job of meeting the requirements of the FMLA. The two areas where the majority of complaints are being received are termination and refusal to grant FMLA leave. Even with the improved level of compliance

employers were still found to owe over $2 million in monetary damages to employees who had failed to be treated as required by the FMLA.

UNIVERSITY OF MICHIGAN AFFIRMATIVE ACTION CASES ALREADY APPLIED TO THE WORKPLACE

Sure, you've been waiting for this to happen. The federal courts have now begun to apply to employment situations the Supreme Court's ruling in the University of Michigan affirmative action cases. The Seventh Circuit U.S. Court of Appeals has upheld the Chicago Police Department's use of a standardized promotion exam that favors minority candidates. To give minority candidates a level playing field, the Department standardizes its exam (much like the SAT or ACT tests) resulting in an increase in test scores for minority candidates. Nonminority employees who took the test and were not promoted sued the Department claiming that the exam illegally penalized them.

The court examined the issues under the Supreme Court's rules announced in the University of Michigan affirmative action cases this past summer. (Recall that in those cases, the Supreme Court found that states have a compelling interest in achieving affirmative action, but that an inflexible and highly objective admissions process that assigned each minority applicant 20 extra points in their admissions score was improper.)

The court recognized that the Department had a compelling interest in achieving greater diversity. It said the method the Department used for "standardizing" its test scores was a technical process that reviewed individual exam questions for race, age, and socio-economic bias, before altering the scores. The court ruled that "standardizing the scores can be seen not as an arbitrary advantage given to the minority officers, but rather as eliminating an advantage the white officers had on the test."

For private employers the case means a two important things. First, contrary to some legal industry publications, the University of Michigan affirmative action cases are going to be relevant to affirmative action in employment even though those cases addressed affirmative action specifically in school admissions. Second, highly objective incentive programs that give minority candidates a distinct and tangible advantage over non-minority candidates are probably no longer permitted. If an employer finds that it needs to be more favorable to the applications of females and minorities, its review of those applications should be a highly individualized process, with race and gender given more subjectively (not objectively) positive weight. Hiring processes that are based on mathematical formulas or other point-based criteria should not allow candidates to gain a mathematical or point advantage based on their race or gender.

If you have questions about affirmative action, please call David Middlebrooks or Matt Stiles at (205) 326-3002.

EMPLOYER DOES NOT VIOLATE PRIVACY ACT BY READING AGENT'S E-MAIL

The case of *Fraser v. Nationwide Mutual Insurance Company*, (3d Cir., Dec. 10, 2003), involved the company reading its agent's e-mail that was stored on the company's computer system. The agent was terminated after Nationwide became aware that he had drafted letters to competitors offering to transfer Nationwide policies to those companies. Once Nationwide became aware of those letters, it opened the agent's stored e-mail and terminated him.

The agent argued that the company intercepted his e-mail in violation of the Electronic Communications Privacy Act and that he was terminated in violation of public policy. The court rejected the argument that the e-mail was intercepted. According to the court's analysis, the Electronic Communications Privacy Act addresses communications that are intercepted as they are sent, but does not protect against an employer's search of a stored e-mail. **According to the court, for there to be an interception of an e-mail message, it "must occur contemporaneously with transmission" of the e-mail. Furthermore, the court noted that the Act also "protects searches conducted by the person or entity providing a wire or electronic communications service."**

It is important for employers to issue employees protocols for the use of company technology, including the company's right to search stored messages. We have several sample e-mail, internet and technology use policies; please contact us if you would like to receive them.

DID YOU KNOW . . .

. . .that the United States Department of Labor plans to issue final proposed changes to the overtime exemption requirements by the end of March 2004? It is uncertain when or if those changes ultimately will become effective. Remember that the proposed changes would occur during an election year, which may affect their implementation.

. . . that according to the Bureau of Labor Statistics, first year wage increases for all contracts negotiated during 2003 were 3.1%, down from 3.9% in 2002? Manufacturing first year increases were 2.1% (2.8% in 2002), non-manufacturing 3.8% (4.3% in 2002) and construction increases were 2.7% (4.4% in 2002). First year increased for state and local government employees were 3% during 2003, down from 3.8% in 2002.

. . . that 63.8 million Americans volunteered during **2003, which represents 28.8% of the U.S. non-military population over age 16?** This is an increase from 27.4% total in 2002. Women volunteer at a higher rate than men, according to the Bureau of Labor Statistics. Approximately 35% of all adults between ages 35 and 44 volunteer, the highest of any age category.

. . . that on December 10, 2003 unions demonstrated in 38 states to support changing the labor laws to eliminate secret ballot elections and instead determine union representation based upon card signing? The rallies were sponsored by the AFL-CIO, with the leading unions including the Steelworkers, Communications Workers, Service Employees, Teamsters and the American Federation of State, County and Municipal Employees. In speaking at a Washington, D.C. rally, Sen. Kennedy, a sponsor of the proposed legislation, told the unionists that "as long as I have a voice and as long as I have a vote, it will be with you."

LEHR MIDDLEBROOKS PRICE & VREELAND, P.C.

Brett Adair	205/323-9265
Stephen A. Brandon	205/909-4502
Donna Eich Brooks	205/226-7120
Michael Broom (Of Counsel)	256/355-9151 (Decatur)
Barry V. Frederick	205/323-9269
Jennifer L. Howard	205/323-8219
Richard I. Lehr	205/323-9260
David J. Middlebrooks	205/323-9262
Terry Price	205/323-9261
Matthew W. Stiles	205/323-9275
Michael L. Thompson	205/323-9278
Albert L. Vreeland, II	205/323-9266
J. Kellam Warren	205/323-8220
Sally Broatch Waudby	205/226-7122
Debra C. White	205/323-8218
Lyndel L. Erwin Wage and Hour and Government Contracts Consultant	205/323-9272
Jerome C. Rose EEO Consultant	205/323-9267
John E. Hall OSHA Consultant	205/226-7129

Copyright 2003 – Lehr Middlebrooks Price & Vreeland, P.C.

Birmingham Office:
2021 Third Avenue North
Post Office Box 11945
Birmingham, Alabama 35202-1945
Telephone (205) 326-3002

***Decatur Office*:**
303 Cain Street, N.E., Suite E
Post Office Box 1626
Decatur, Alabama 35602
Telephone (256) 308-2767

THE ALABAMA STATE BAR REQUIRES THE FOLLOWING DISCLOSURE:
"No representation is made that the quality of the legal services to be performed is greater than the quality of legal services performed by other lawyers."

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