"Your Workplace Is Our Work"®

September 2004
Volume 12, Issue 9

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 are pleased to announce that the newly revised ALABAMA EMPLOYER'S DESK MANUAL, a practical "can do" resource covering twenty-six chapters concerning employment and labor relations matters is now available. We are also offering a two day "Desk Manual Workshop" scheduled for October 19 and 20, 2004 in Birmingham, where each attendee will receive a ALABAMA EMPLOYER'S DESK MANUAL as part of the registration fee.

Attached to this bulletin is an agenda for the two day workshop, the table of contents of the desk manual and a registration and order form for the desk manual and workshop. The presenters at the workshop will be our attorneys and consultants, covering the subject matter in a practical approach with an emphasis on employer rights. Please contact Steve Brandon at 205/323-8221; sbrandon@lmpv.com with any questions about the Desk Manual or workshop.

WORKER'S COMP RETALIATION CLAIM FAILS: EMPLOYEE LIED ABOUT MEDICAL HISTORY

The general principle is that if an employer has the right to ask a question of an applicant, the employer has the right to not hire or terminate if the applicant or employee answers the question untruthfully. In the recent case of *Carter v. Tennant Company,* (7th Cir., Sept. 13) Carter was asked as part of his conditional offer of employment about his health condition and whether he had any prior work related injuries. He stated that he had back problems but answered "no" in response to questions about work related injuries. As things turned out, Carter was receiving benefits from a job related injury at the time he was hired by Tennant.

During his employment with Tennant, Carter's medical benefits for his prior job related injury were terminated when he failed to appear for a medical exam. Two weeks after his benefits were terminated, he told his supervisor at Tennant that he had injured his back. The physician who examined Carter told Tennant stated that he "re-aggravated" his prior injury. Tennant terminated Carter when it became aware that Carter had lied about his previous injury.

Carter argued that he was terminated in retaliation for filing a workers' compensation claim. Among the reasons for rejecting Carter's claim, the court stated that "[Carter] answered [questions] dishonestly, and this provides a valid, non-pretextual reason for Tennant's decision to discharge him." The court also noted that Tennant's employment application stated that a "misrepresentation or omission may be justification for refusal of employment, or if employed, termination of employment." The court also noted the following language in the company's employee handbook: "False or misleading information in personnel records, time cards, information about injuries, or other company records or documents may lead to suspension and disciplinary action, up to and/or including termination."

Carter argued that the employer's medical inquiry was not permitted under Illinois law, although permissible under the Americans with Disabilities Act. The court stated that even if the question violated Illinois law, the employer's reason for terminating him due to his untruthful answer was a legitimate reason unrelated to his on the job injury.

Most employers provide that falsification or misleading information on the employment application will be a basis for non-hire or termination. Do not use the term "material" to describe a misrepresentation or omission; that language actually limits the employer's options. Although employers should be consistent where there is an omission or misrepresentation, some employers evaluate the nature of the misleading or omitted information and, if discovered after the employee was hired, when this became known and the employee's overall work record. An employer is not required to treat applicants and employees the same for an omission or misrepresentation, provided the employer has business reasons for the differences in treatment.

DELAY IN RETURNING EMPLOYEE TO WORK VIOLATES FMLA

Employee Lori Hoge worked for Honda Manufacturing in East Liberty, Ohio. She requested and was approved for an FMLA absence from May 11 until June 12, 2000 for surgery and post-surgery recovery. She provided Honda with medical confirmation of a need for an extended FMLA absence until June 26. Upon her release from her doctor, Hoge reported to work on June 27, 2000. She was told that no positions were available until July 31, 2000. She sued under the Family and Medical Leave Act, arguing that once she offered to return to work, the company had a duty to place her in the same or equivalent position. *Hoge v. Honda of America Manufacturing, Inc.*, (6th Cir. Sept. 16, 2004).

The federal district court agreed with Hoge, and ruled that she should have been permitted to return to work on June 28, the day after she made herself available. The court of appeals upheld the lower court's decision. **The FMLA provides that the employee upon return from leave shall be restored to the same or equivalent position. The employer argued that implied within that language is job restoration "within a reasonable period of time." According to the court of appeals, the statutory language "is not ambiguous and contrary to Honda's argument . . . if Congress had intended to permit employers to restore employees within a reasonable time after their need for FMLA leave had ended, it would have so stated."** The court added that job restoration arises when "the returning employee is able to perform the essential functions of the position or an equivalent."

The court stated that an employer may uniformly adopt and apply a policy that states an employee must be able to show medical certification that he or she is able to perform the

essential job functions. In one minor difference with the district court, the court of appeals stated that the date by which Hoge should have been returned to work is June 29, two days after she made herself available, which is the timetable stated in the United States Department of Labor FMLA regulations.

EEOC TO BEGIN "CALL CENTER" ON AN OUTSOURCE BASIS

The EEOC on September 17 approved the authorization of funds for a two-year program to establish a national call center, to be operated by an independent contracting entity. According to the EEOC, it receives approximately 1,000,000 unsolicited calls a year. Most of those calls it believes can be handled routinely through the call center process. The call center outsourcing will cost between $2,000,000 and $3,000,000. The EEOC estimates that to create an internal call center "could cost $12,000,000 for infrastructure alone."

The EEOC anticipates the call center will begin operations by mid-2005. The call center employees will be referred to as customer service representatives. According to the EEOC, approximately 60% of all callers seek information that can obtained either through an automated telephonic communication system or via the EEOC's website. The remaining 40% of calls received are inquiries about filing charges of discrimination. In essence, the call center will serve as a filter to refer to specific EEOC offices callers with questions about filing discrimination charges, yet attempt to filter out those calls that can be handled through referrals to EEOC telephonic or website sources.

TAKE IT TO THE JURY – INAPPROPRIATE ARBITRATION AGREEMENT NON-BINDING

Poly-America manufacturers trash bags and shrink wrap. The company thought it had an "air tight" mandatory arbitration of employment disputes agreement, until it sought to enforce it with an employee who sued for retaliatory discharge arising out of a work related injury. A Texas Court of Appeals ruled that restrictions within the terms of the arbitration agreement precluded it from being enforceable. *In re Luna* (TX Ct. App, Sept. 9, 2004).

The following terms of the arbitration agreement rendered it unenforceable:

- The compensation costs were split equally between the employer and employee, with the employee's cost capped at the highest level of pay the employee earned in any one month during the prior twelve months. In this case, Luna would have paid approximately $4,500.
- The terms of the arbitration agreement precluded the award of punitive damages and reinstatement.
- Under state law, a workers' compensation retaliatory discharge claim could be filed within a two-year statute of limitations. The arbitration agreement provided for a one-year limitation.

In addressing these terms, the court stated that an arbitration agreement that limits statutory rights must be carefully scrutinized for unconsciounability. According to the court, **the unavailability of reinstatement and punitive damages wiped out key provisions of statutory rights and, therefore, the arbitration agreement could not be enforced. Furthermore, the limitation on the statutory period and high cost for an employee to arbitrate further justified the court in denying enforcement of the agreement.** According to the court, "the arbitration cost imposed on Luna, who provided evidence of the cost of arbitration and his inability to pay, in addition to the limitations on Luna's opportunity to be reinstated and to recover punitive damages, rendered the arbitration agreement . . . so one-sided in Poly-America's favor and so oppressive to Luna as to be substantively unconscionable . . ."

Remember that an arbitration agreement is an alternative forum for resolving a dispute. It is more likely to be enforceable when the cost and remedies available to the individual mirror those available if the employee had not signed the arbitration agreement.

OSHA TIP: OSHA AND NON-ENGLISH SPEAKING WORKERS

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 disproportionately high rate of injuries and fatalities of non-English speaking workers is a major concern to OSHA. Evidence of the priority given this issue may be seen in the agency's Spanish webpage, its data collection on the topic and the targeting of inspections in sectors with high concentrations of such workers. If you need further proof, check out the training grants dispensed by OSHA in recent years and note the focus on language.

Addressing an Hispanic Safety and Health Conference in July of this year, Assistant Secretary of Labor, John Henshaw noted that while overall workplace fatalities were falling, among Hispanic workers they rose by 12% in 2000 and 10% in 2001. He also stated that from the agency's own data, about 25% of the fatalities investigated are in some way related to language and cultural barriers.

OSHA standards, including in excess of 100 training requirements, as well as those pertaining to warning, caution and informational signs, don't specifically address the issue of multiple languages. Where there is a reference, it is to English. The Hazard Communication Standard in Section 1910.1200(f)(9) states, for instance, that labels must be in English. It goes on to say that other languages may be added as long as the information is presented in English as well.

The hook OSHA has in holding employers accountable for the safety of their non-English speaking employees is through applying its standards that require employee training. OSHA's construction standards require the employer to "instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment." **If required instruction and training is given in English only and the work crew is non-English speaking, there is obviously a problem. The burden is on the employer to ensure that safety information is understood. A number of standards require some type of feedback that would demonstrate the worker's grasp of a training topic. An example is the personal protective equipment standard.** It states, "Each employee affected shall demonstrate an understanding of the training specified… "An agency interpretation letter sets out its enforcement position on this topic. It states in reply to a question, "If the employees that are required to receive this information and training do not comprehend verbal English, the employer must inform and train these employees in a language which is comprehensible in order to satisfy the requirements…"

The message is to not assume the employee "gets it" when it comes to safety training and instruction. This applies to all employees, not just the non-English speaking. Remember that when OSHA comes, you can count on being asked to explain how you provide training and safety instructions to any non-English speaking employees

EEO TIP: HOW FAR MUST AN EMPLOYER GO IN MAKING ACCOMMODATIONS UNDER THE PDA?

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.

September is the ninth month of the year and thus, it may be a good time to remember that employer's may need to provide certain "reasonable" accommodations under **the Pregnancy Discrimination Act (PDA).** As is generally known, the PDA was passed in 1978 by Congress as an amendment to Title VII of the Civil Rights Act of 1964. The purpose of the act was to make pregnancy discrimination a form of sex discrimination under Title VII. The basic premise of the PDA is that employers must treat employees **affected by pregnancy** or "**related medical conditions**" the same way that other employees are treated who, similarily, have temporary limitations or "disabilities." Thus, if allowances are made to males or other non-pregnant employees who incur temporary disabilities, such allowances must also be made for pregnancies.

But the question is, how far must an employer go in providing such accommodations? The PDA makes it clear that an employer cannot make an assumption, based upon some stereotypical belief, that a pregnant employee would be incapable of performing all of the duties of her position, or that she probably will not return to work after childbirth. This raises the question of exactly what the legal standard for accommodating a female employee's pregnancy limitations should be. Is it, for example, the same as for a disabled employee under the Americans With Disabilities Act or the "de minimus" standard under Title VII for religious accommodations?

Actually, it is neither. **The degree of accommodation in fact, simply, must be comparable to the accommodations afforded other employees who are temporarily disabled.** That sounds plain enough but in practice it may be more difficult. Perhaps a good way to understand how the standard has been applied would be by summarizing certain, relevant court decisions as to what the PDA does not require. For example:

With Respect To Fringe Benefits courts have held that:

- **The PDA does not require employers to treat pregnant workers better than other disabled employees,** but only establishes the minimal benefits which the employer must provide to pregnant workers which will not violate federal law. (See *California Federal Savings & Loan Assn. V. Guerra*) Thus, **the act does not necessarily require the provision of fringe benefits** but merely prohibits discrimination on the basis of pregnancy, childbirth, or related medical conditions if such benefits are provided to other workers. Accordingly, it could be stated that **the PDA does not require the treatment of pregnancy in any particular manner,** except that what ever treatment is provided must not be discriminatory.

With Respect To Maternity Leave courts have held that:

- **The PDA does not directly obligate employers to offer maternity leave or to take other steps to accommodate pregnant workers,** but it does obligate an employer to treat a pregnant employee as well as it would have if she were not pregnant.

Note: This should not be confused with the **Family Medical Leave Act** (FMLA) provisions which mandate that employers grant up to 12 weeks of leave per year for child care purposes

Other courts have held that **the PDA does not require employers to treat pregnancy-related absences more leniently than other absences**. Or as stated bluntly by one court, **"federal law does not require employers to make accommodations for its pregnant employees; employers can treat pregnant women as badly as they treat similarly affected, but non-pregnant**

employees. *Alvarez Cabrera v. Trataros Construction Inc.,* (D.P.R. 2002)

A Word of Caution. Notwithstanding the foregoing court decisions, we would strongly urge a great deal of caution in adopting them as a part of any employer's personnel policies and practices. First, from a purely public relations point of view such harsh policies would seem to be against motherhood which is not a good idea in our society. Secondly, since only woman can be affected by pregnancy, the bar for proving disparate treatment and thus, sex discrimination, against pregnant workers is comparatively low. In our judgment a balanced approach to the provision of fringe benefits and implementing leave policies for all employees makes good business sense.

The EEOC in its *Technical Assistance Manual* suggests the following tips to employers on how to avoid at least certain, specific charges of sex discrimination under the PDA:

- **Remember that an employer must use the same procedures to determine a pregnant employee's ability to work as it uses to determine a temporarily disabled employee's ability to work.**
- **Remember that, generally, an employer may not specify the time that maternity leave commences. (**E.g. it cannot require pregnant employees to go out on leave 6 weeks before delivery.)
- **Fringe benefits must be comparable. (**E.g. If an employer's health plan covers pre-existing medical conditions, it must cover an insured employee's pre-existing pregnancy.)
- **Any limitations on medical expenses cannot be applied exclusively for pregnancy-related conditions (**e.g. covering the cost of a private room.

The foregoing barely scratches the surface in terms of the myriad issues that can arise with respect to pregnancy, but hopefully it provides the basic principles by which to approach problems under the PDA. In next month's issue we will discuss whether an employer can lawfully exclude its female employees in general and pregnant females in particular from certain jobs, either because sex is a Bona Fide Occupational Qualification (BFOQ) or for purposes of "Fetal Protection."

DID YOU KNOW . . .

. . . that a successor employer violated the National Labor Relations Act by refusing to hire a predecessor employee who protested overtime requirements? *Chugach Management Services Co., Inc*., (342 NLRB 69, August 4, 2004). According to the NLRB, the company characterized the employee as "disruptive" for refusing to work overtime and failed to show that there were other business reasons why the employee was not hired. The Board concluded that that overtime protest was "concerted activity" under the National Labor Relations Act, thus protecting the employee from retaliation for his protest.

. . . that a recent survey predicts strong hiring during the last quarter of 2004? According to a September 14 survey by Manpower, Inc., 28% of 16,000 companies that were surveyed planned to add jobs during the last quarter of the year, compared to 7% that said they plan to reduce employment levels. One year ago, the projected hiring levels for the last quarter were approximately 10%. Hiring is projected to improve in durable goods manufacturing and weaken in construction and education, but otherwise remain steady in all other sectors of the economy.

. . . that the former president of Teamsters Local 988 embezzled more than $22,000 from his local? The deed was accomplished through excess payments for a union hall telephone system and union stickers and t-shirts. When Teamster president Chuck Crawley sought bids for a telephone system, he asked his secretary's husband to add an extra $20,000 for Crawley. Even though the husband's bid with the extra $20,000 was the

highest bid, he got the job and Crawley got the money.

. . . that according to the Bureau of Labor Statistics, unemployment nationally for August declined from 5.5% to 5.4% as 144,000 non-farm jobs were added? Those states with unemployment of 6% or higher include Alaska, Washington, Oregon, Alabama, Illinois, Michigan, Ohio and South Carolina. Alaska has the highest unemployment percentage (7.6%) and Hawaii the lowest (2.9%).

LEHR MIDDLEBROOKS PRICE & VREELAND, P.C .

Brett Adair	205/323-9265
Stephen A. Brandon	205/323-8221
Donna Eich Brooks	205/226-7120
Michael Broom (Of Counsel)	256/355-9151 (Decatur)
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 2004 – 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

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

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."