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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:

Last year, approximately 30% of all discrimination charges nationally alleged "retaliation." The recent case of *Hamilton v. Spraying Sys., Inc.,* (N.D. Ill. Sept. 27, 2004) illustrates how a retaliation claim can arise when an employer is trying to do the right thing – transfer an employee from a department where she alleges she was harassed, threatened and discriminated against based upon sex and race.

Hamilton was hired in 1998 as an operator and received promotions to a set-up operator position. Her training for promotion opportunities included company sponsored classes and "on the job training" from her peers. However, the peer training ceased. Hamilton alleged that her peers stopped training her because of her race and sex. She also alleged that they deliberately tried to harm her and sabotage the machine on which she was working. Sometime after Hamilton wrote letters to the company vice president and human resources department complaining of harassment, the company transferred her to another department where the training and advancement opportunities were limited. The court denied the employer's motion for summary judgment, concluding that Hamilton raised enough questions of fact for a jury to decide whether transferring her to a department with fewer opportunities was retaliatory.

This case is an example of how an employer can be placed in a "Catch-22" position where there is risk in whatever decision is made by the employer. The following are some suggestions on how to approach a transfer without provoking a retaliation claim:

- If the transfer would diminish the opportunities of the transferee on a long-term basis consider the transfer a temporary one. Work with the transferee and the employees in her former department to address workplace issues such that returning to the department is possible.
- Provide the employee who raises the complaint with options; explain actions that would occur to address the concerns of the employee if he or she remains in the department and discuss transfer opportunities and their implications. Although the employer may ultimately "force" a transfer, the most effective initial approach is to provide choices to the affected individual.

If a transferred employee returns to the original department, follow-up and monitor the situation to be sure there is not peer retaliation against the individual. Counsel those in the department regarding expectations regarding their behavior; if the transferee in your judgment contributed to the problems, discuss what is expected of the transferee and monitor that as well.

WAGE AND HOUR TIP: HOW SHOULD AN EMPLOYER HANDLE BUSINESS CLOSINGS DUE TO INCLEMENT WEATHER . . . SUCH AS HURRICANES OR WINTER STORMS

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.

Many employers have recently been required to close because of dangerous inclement weather. Hurricane Ivan wreaked havoc and forced many business closures in order to ensure the safety of employees and/or due to the loss of vital services such as electric power. Several employers who wanted to determine their obligations to their employees in terms of wages when they closed due to the weather contacted our office. Therefore I decided to try to provide some general guidelines regarding the matter.

Below are some of the more common questions that have been asked.

1. **When a company closes because of inclement weather, must the company pay an hourly non-exempt employee for the day(s) when the business was closed?**

   A. No. The employer is not required to pay an hourly non-exempt employee for the time when the business was closed. At the company's discretion the hourly non-exempt employee may be allowed to use his/her vacation days.

2. **If a non-exempt employee is not able to leave the company's facility because of inclement weather and continues to work, must the company pay the employee overtime for any hours worked in excess of forty (40)?**

   A. Yes. Non-exempt hourly employees who work more than forty (40) hours in a workweek must be paid overtime. If the employee is at the employer's facility more than 24 hours is relieved from duty and provided adequate sleeping facilities the employer may be able to deduct up to eight (8) hours of sleep time per day.

3. **Must a non-exempt employee who reports to work and then is sent home because of inclement weather be paid for the full day?**

   A. It depends on the pay plan that is in effect for that employee. Alabama does not have a law requiring that an employee be paid for a minimum number of hours when they report for duty and thus you must only pay the employee for the hours actually worked. However, some states do have state statutes requiring employees to be paid for 2-4 hours of reporting time. Thus, if you have employees in other states you should check for any state or local laws that may be applicable.

   If the non-exempt employee is paid on a "fixed salary for fluctuating workweek" pay plan the employee must be paid his/her full salary for the week if he/she works any portion of the workweek. Consequently, if your business was open on Monday but was closed due to inclement weather the remainder of the week an employee working under this plan would be entitled to his/her full salary for the workweek.

4. **How is a salaried exempt employee to be treated for the day(s) when the business was closed?**

   A. The new regulations related to the requirements for exemptions state that "an

employee is not paid on a salary basis if deductions … are made for absences occasioned by the employer or the operating requirements of the business." The Department of Labor has interpreted this to mean that you may not deduct the employee's salary for time missed due to the business being closed for inclement weather. Further, they take the position that an employer cannot require the exempt employee to use his or her vacation days for the time period when the business was closed.

While I hope we do not have any more hurricanes anytime soon, winter is approaching and quite often brings ice and snow storms that require companies to close for one or more days. These same rules would apply in that case also. If you have additional questions do not hesitate to contact me.

EEO TIP: FETAL PROTECTION POLICIES UNDER THE PREGNANCY DISCRIMINATION ACT

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 U. S. Equal Employment Opportunity Commission (EEOC). As Regional Attorney Mr. Rose was responsible for all litigation by the EEOC in the State of Alabama and Mississippi. Mr. Rose can be reached at (205) 323-9267.

In the September 2004 issue of the *Employment Law Bulletin,* we discussed the question of how far an employer must go in providing accommodations to pregnant employees. A related issue, which is the focus of this month's article, is whether the employer's accommodation, or lack thereof, has more to do with the protection of the unborn fetus or the employee, and whether that results in a legal distinction in the employer's basic obligations. **The crux of this issue is whether an employer can lawfully maintain a "Fetal Protection Policy" which in effect prohibits females from working on certain jobs or in certain job classifications because of some potential harm to the fetus, not the employee herself.**

For background purposes it might be well to summarize the basic, legal obligations of an employer under the Pregnancy Discrimination Act (PDA) which were set forth in last month's article. According to relevant case law:

- Female employees must be treated the same for all employment-related purposes (including any fringe benefits) as other employees who are not pregnant but who are similar in their ability or inability to work. In other words, the Pregnancy Discrimination Act (PDA) simply prohibits employers from treating pregnancy or pregnancy-related medical conditions in a manner which is different from the treatment of other disabilities.
- The PDA only prohibits discriminatory treatment. Thus, an employer is not compelled to treat pregnant workers better than other temporarily-disabled employees, or as one court put it: "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." Hence, the PDA only establishes a floor below which the employer cannot go with respect to the terms and conditions of employment.
- An employer may not specify the time that an employee must take maternity leave. That decision must be left to the employee and her physician.
- The absolute bedrock principle of the PDA is equality of treatment.

Perhaps unfortunately, because of the principle of equality, the PDA has been interpreted to require that an employer treat all workers the same in terms of protecting their potential offspring. The issue of whether an employer could exclude women from certain jobs or job classifications which posed a potential health

hazard to a fetus was raised in several prominent cases including an Alabama case *Hayes v. Shelby Memorial Hospital* (11th Cir. 1984) (where females were excluded from jobs in which there was potential exposure to X-rays), and *Wright v. Olin Corporation* (4th Cir. 1982). In both of these cases the court held that females could be excluded from certain jobs if the employer could justify the exclusions based on business necessity. They also held that a Fetal Protection Policy could be a bona fide occupational qualification (BFOQ). However, both cases were overruled by the Supreme Court in *UAW, et al v. Johnson Controls* (S. Ct. 1991) (where fertile females had been excluded from jobs in which there was "excessive" exposure to lead)

In the *Johnson* case, the Supreme Court held that Title VII forbids sex-specific fetal protection policies, and that any potential hazard to the fetus did not satisfy Title VII's definition of a BFOQ. The Court held that both the BFOQ provisions and the PDA prohibit an employer from discriminating against a fertile female "unless her reproductive potential actually prevents her from performing the duties of her job." Thus, it is clear that pregnancy and fetal protection policies, unless carefully tailored to fit certain, specific, individual circumstances are probably illegal.

A high percentage of PDA violations occur in connection with the enforcement of policies and practices pertaining to leaves of absence and/or fringe benefits. Thus, employers should be aware of such potential violations even if they are not specifically designated as a fetal protection or pregnancy policy. For example, based on current case law a prima facie case of discrimination would exist where:

- Pregnancy or related medical conditions are excluded from a policy that provides leaves of absence for disabilities in general (e.g. sick leave with pay for certain disabilities but not for pregnancy).
- The employer's policies regarding leaves of absence for nonpregnancy-related disabilities and pregnancy-related conditions differ in the amount of time permitted or required for such leave (e.g. 90 days for non-pregnancy, but only 60 days for pregnancy related disabilities).
- The employer's policies with respect to paid or unpaid leave result in differing treatment for pregnancy-related disabilities and other disabilities (e.g. where employer required mandatory leave without pay for pregnancy, but allowed male employees to take paid leave with respect to minor temporary disability).
- The employer's policies with respect to seniority or other benefits accrue during medical or disability leave but not during pregnancy leave (e.g. where under collective bargaining agreement, no seniority would accrue after 90 days of maternity leave, but employees on medical leave could accrue seniority for up to three years).
- The employer's maternity leave policies distinguish between married and unmarried pregnant employees (e.g. where an unmarried pregnant employee was forced to take parental leave without being guaranteed her job upon return, while a married pregnant employee was guaranteed her former position).

The key to understanding the PDA and avoiding a violation is to apply the principle of equality comprehensively in dealing with the issue of pregnancy. However, under any circumstances, an employer has a viable defense if it can prove that a particular individual, pregnant employee cannot perform the essential functions of her job. Obviously, legal counsel should be consulted before implementing any policy or practice that might constitute disparate treatment of an individual employee or have an adverse impact on pregnant females in general.

OSHA AND SUBSTANCE ABUSE

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 reac hed at (205) 226-7129.

By all accounts drug and alcohol abuse is a pervasive problem in our society. **OSHA's website notes that in 2003 about 75 percent of the illicit drug users aged 18 and older were employed either full or part-time. Research indicates that between 10 and 20% of the nation's workers who die on the job test positive for alcohol or other drugs.** Industries with the highest rates of drug use are the same as those at a high risk for occupational injuries, such as construction, mining, manufacturing and wholesale. According to a survey by the National Institute of Drug Abuse, 28.1% of construction workers admitted to using illegal drugs.

OSHA does not have a standard requiring employers to have workplace drug and alcohol programs, nor is there a standard on its regulatory agenda. In some circumstances however, the general duty clause, Section 5(a)(1) of the OSH Act, may be used to cite an employer for hazards arising from substance abuse. In the absence of a specific standard, a general duty clause citation may be issued when all of the following conditions are met: (1) the employer failed to keep its workplace free of a hazard, (2) the hazard was "recognized" individually by the employer or generally by its industry, (3) the hazard was causing or was likely to cause death or serious physical harm and (4) there was a feasible means to eliminate or materially reduce the hazard.

OSHA's general duty clause citation in one such case charged that employees were exposed to hazards created by an operator driving a powered industrial truck around the jobsite while intoxicated. The citation went on to state, that among other means, one possible correction would be to develop, implement and enforce an alcohol and drug prevention program with employee testing, daily observation, and the monitoring of employees for signs of possible intoxication.

Through its website information, interpretation letters and alliances, as well as citations, the agency has demonstrated support for workplace drug and alcohol programs including reasonable drug testing. As noted on its website, OSHA recognizes that impairment by drug or alcohol use can constitute an avoidable workpace hazard. Five components are identified as needed for a comprehensive drug-free program. They include a policy, supervisor training, employee education, employee assistance and drug testing. It cautions that such programs should be reasonable and take into account employee rights to privacy.

OSHA standard 1910.1020 gives employees access to their own medical and exposure records. This could include drug testing results if they are maintained as part of the employee's medical program and records. The standard, 1910.1020, does not apply to voluntary employee assistance programs if maintained separately from the employer's medical program records.

NATIONAL ORIGIN HARASSMENT AND LANGUAGE REQUIREMENTS:

A GROWING CONCERN AS OUR WORKPLACE DEMOGRAPHICS CONTINUE TO CHANGE

Although sexual harassment allegations lead the way in the overall harassment category, harassment claims based upon religion and national origin continue to increase. Recently, an employer settled a national origin harassment claim for $750,000 paid to ten Mexican plaintiffs who were subjected to ethnic slurs, such as "stupid wetbacks", on a daily basis for a year. *EEOC v. Phase 2 Co.*, (D.

Colo. June 1, 2004). Furthermore, Mexican employees were segregated regarding which restrooms and break areas they could use and otherwise treated differently from Anglo employees. The $750,000 represents a settlement of the claims pursuant to a consent decree. The settlement also includes extensive workplace harassment training.

Employer workplace harassment policies should not be limited to sexual harassment, but rather should include all protected classes and behavior the employee considers intimidating, threatening, offensive or degrading. **If an employee's English skills are limited to such that he or she cannot read or understand English well, the harassment policy should be written in the language they can understand. Otherwise, the policy will be virtually useless in the employer's efforts to show that it developed the proper procedures for employees to notify the employer of harassment issues.** We also suggest other "core value" policies, such as fair employment practices, be written in the language employees understand.

National origin issues may also involve "English only" or other language related issues. An employer may require that during work time employees speak "English only." Courts have supported employer concerns regarding the impact on the workplace if employees speak to each other in a language that other employees do not understand. An employer may also require that employees be bi-lingual, if that relates to the job. For example, in the recent case of *Dalmau v. Varig Airlines,* (S.D. Fla. Aug. 11, 2004) the court concluded that it was not national origin discrimination for the employer to require applicants to speak English and the native language of Brazil, due to communications necessary with those who do not speak English at the home office in Brazil.

AN EXCELLENT REASON FOR NOT HIRING SOMEONE: THEIR WORK HISTORY

Employers know from experience that an individual with a reliably unreliable employment history is a higher risk than one with a stable employment background. The key to avoid or successfully defend employment disputes related to using such factors is to apply them consistently, as illustrated in *Ellis v. Elgin Riverboat Resort*, (N.D. Ill. Sept. 22, 2004).

Ellis worked for Elgin as a casino dealer for five months. She left and the company rehired her, but her next tour of employment lasted only a few days and she quit without notice. During the next three years, she worked at four different casinos, none for longer than six months. The employer generally did not rehire individuals who left without notice, but due to a shortage of qualified card dealers, it waived that rule when necessary.

As one would predict, Ellis applied to work at Elgin for a third time. Although the company softened its no rehire rule, it applied it to her. She alleged that she was not rehired because of her race, and in rejecting the claim, the court held that **"Title VII does not compel employers to hire unqualified applicants with questionable employment histories. A plaintiff's work history is relevant to her employment discrimination claim. . . a poor work history alone could be grounds for finding a plaintiff unqualified for a job."** One suggestion to help employers avoid this case is to notify the individual at termination, if possible, whether he or she is eligible for reemployment. If an individual knows that reemployment will not occur, perhaps that individual will not even reapply.

REASONABLE ACCOMMODATION FOR RELIGIOUS PRACTICES IS NOT REQUIRED IF IT CAUSES "UNDUE HARDSHIP"

Approximately 40 Muslims worked together on a production line at a Whirlpool factory in Tennessee. Several of the Muslim employees requested time off from their line to conduct sunset prayers on a daily basis. The employer rejected the request, stating that it would cause the line to shut down, which would delay the manufacturing process on other lines. Muslims are required to pray five times a day. However, only the sunset prayers would have resulted in undue hardship to the employer.

The court permitted the case to go to a jury, which returned a verdict for the employer. The evidence indicated that Whirlpool was the only remaining domestic manufacturer of room air conditioners. It operated according to "lean manufacturing" principles, which would be compromised if it permitted the employees time off from the line for the sunset prayers. In contrast to the "reasonable accommodation" and "undue hardship" analysis under the Americans with Disabilities Act, an employer has a low threshold of proof in religious accommodation cases to establish that the accommodation would cause undue hardship. In the Whirlpool case, demonstrating the increased costs and disruption to the manufacturing process was overwhelming evidence of undue hardship.

CALIFORNIA PASSES MANDATORY SEXUAL HARASSMENT TRAINING LAW

Employers anywhere in our country who do not conduct annual workplace harassment training enhance their risk of liability in the event a harassment dispute arises. California has taken this risk one step higher by requiring mandatory sexual harassment training of all supervisors for employers with 50 or more employees. The California law becomes effective on January 1, 2006. The law requires two hours of training per year to all supervisors who were employed as of January 1, 2005, and who to all newly hired supervisors after January 1, 2006 within the first six months of their employment. The law requires that the training occur every two years, although we recommend that it occur annually.

Successfully completing the training under the terms of California law does not shield an employer from liability nor will it necessarily prevent a harassment dispute from arising. Furthermore, failure to provide the training does not mean there will be liability for alleged sexual harassment, although the credibility of a non-compliant employer's witnesses will be impaired by the failure to provide such training.

In today's workplace, an employer not providing annual training of supervisors and managers regarding workplace harassment, fair employment practices, discipline and documentation and hiring (if involved) risks falling below the standard of care regulatory agencies, judges and juries expect of employers. We offer extensive supervisory and management training to assist employers with compliance and problem prevention. Please contact us if you would like information regarding the programs offered by our firm and the manner in which those programs are conducted, including programs specifically tailored to your work environment.

DID YOU KNOW . . .

. . . that a privacy suit against the Teamsters and UNITE HERE is permitted, based upon how the unions obtained employee addresses for organizing purposes? *Pichler v. UNITE,* (E.D. Pa. Oct. 13, 2004). The unions obtained employee home addresses by writing down their license plates at work and then accessing their information through state motor vehicle records. The employees alleged that the unions' actions violated the Driver's Privacy

Protection Act of 1994, which is intended to protect us from a knowing disclosure without our permission of personal information. There is an exception under the statute for "civil, criminal, administrative, or arbitral proceeding in any federal, state, or local court or agency . . ." The union argued that because it has pending NLRB claims against the company, it was entitled to the information.

. . . that the EEOC issued guidelines concerning intellectual disabilities? The 20 page question and answer format is accessible through the EEOC website at http://www.eeoc.gov. According the EEOC, approximately 2.5 million Americans have intellectual disabilities, and only 31% of those individuals work. A definition of an intellectual disability is one with an IQ between 70 and 75, "significant limitations in adaptive skill areas," and a disability that originated before the individual's 18th birthday.

. . . that according to the U.S. Department of Labor, Wage and Hour Division, the new exemption guidelines have caused minimal disruption at the workplace? In a statement issued on October 15, 2004, the Department of Labor stated that "almost without exception, the reports indicate people are gaining overtime protection" and not losing overtime pay. In fact, DOL reports that employees who have been moved from exempt to non-exempt under the new regulations consider it a demotion, even though they may receive more pay.

. . . that an employer's failure to reasonably accommodate an individual after a brain aneurysm cost the employer $8,000,000? *Zolnick v. Graphic Packing Corp.,* (D. Colo. Sept. 24, 2004). The plaintiff was awarded $7,500,000 in punitive damages and $506,000 in compensatory damages and attorney fees. The employee had lapsed into a coma, but worked himself back such that he was released to work without restrictions. The company asked for an independent medical examination, which resulted in confirmation that the employee could return to work but his work should be checked by another employee. The company interpreted this recommendation as requiring it to hire an individual to monitor Zolnick, therefore it refused to return him to work. The company did not discuss these results and failed to engage in the ADA's required "interactive" process.

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
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

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.