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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:

How will President Bush's reelection and the election of a greater majority Republican Senate impact employers? First, labor law reform is dead. Organized labor had pushed for legislation to eliminate the need for a National Labor Relations Board conducted secret ballot election for employees to vote on union representation. Secondly, it is unlikely that statutes will expand employer compliance responsibilities. For example, legislation to add "sexual orientation" as a protected class under Title VII will likely not pass, nor will legislation to expand the Family and Medical Leave Act to add more family members or different circumstances necessitating a leave, such as parent-teacher conferences. **Perhaps the most overwhelming impact of the President's re-election on employers will be his appointments to the judiciary.** Senator Spector (R-PA) who will chair the judiciary committee has said that he will not oppose or delay processing the President's judicial nominees. During the next four years, President Bush will likely nominate a new chief justice and at least two associate justices for the U.S. Supreme Court, plus more than 100 federal district and appellate judges. Those judicial appointments are for life. The President's first term judicial appointments indicate a preference for individuals who can serve several years prior to retirement.

Concern about record deficits will result in closer scrutiny of regulatory and administrative agency budgets and activities. The consolidation of EEOC district offices will continue as one outcome of budget constraints. It is unlikely that new initiatives from the EEOC or other regulatory agencies will receive support if the initiative exceeds budget parameters. Our overall assessment is that at the federal level, legislative and regulatory actions regarding the workplace will not increase and, in some areas, current compliance requirements might decrease.

WORKPLACE HARASSMENT PROVOKED BY RECIPIENT'S BEHAVIOR, NOT RACE OR NATIONAL ORIGIN

The case of *Hounton v. Gallup Independent Company* (10th Cir., Oct. 20, 2004) is a good example of the principle that one employee may express his or her dissatisfaction with a co-worker by directing harassing behavior towards that person.

The plaintiff injured his back at work. Accordingly, he was excused from performing heavy lifting. However, he continued to work part-time at his automobile repair shop employer, where his duties required that he change tires. As he performed "light duty" at Gallup due to the back injury, the injured employee, Hounton, laughed at his co-workers because they now were required to perform more heavy lifting: his duties in addition to their own.

Hounton alleged that his co-workers made derogatory comments about his race and national origin. The event that precipitated the lawsuit was when a fellow employee arrived at work drunk and got into a fight with Hounton. Hounton called the police, and the employer told the police to remove Hounton from the premises because he was lazy. The district court granted summary judgment on Hounton's Title VII race and national origin discrimination and retaliation claims. In upholding that decision, the court of appeals stated that "only severe or pervasive workplace conduct that affects the terms, conditions, or privileges of employment are protected by Title VII . . . we conclude a reasonable jury could not find that he made a showing of pervasive or severe harassment **based on race and national origin**." The court characterized the plaintiff's conflicts with his co-workers as a "type of personality conflict" for which there is no remedy under Title VII.

Personality conflicts can become a prelude to either a harassment claim or other workplace behavior that could create a safety risk or other disruption. Even if the objectionable behavior is not reported, employers should become involved in determining the source of the conflict and how it can be resolved, otherwise employee "self help" may erupt from frustration.

OFCCP PROPOSES STANDARDS ON PAY BIAS ANALYSIS: COMPARING APPLES TO APPLES

In the November 16, 2004 Federal Register, The Office of Federal Contract Compliance Programs ("OFCCP") issued notice of proposed standards – which it termed "definitive interpretation" – for systemic compensation discrimination, as well as standards and methods for OFCCP evaluations of contractors' compensation practices during compliance reviews.

In introducing the new standards, the OFCCP noted that its compliance reviews usually focus on allegations of systemic discrimination, not allegations involving discrimination against an individual employee. Although the Department of Labor published "Sex Discrimination Guidelines" in 1970 that included discussion of discriminatory wages, OFCCP has not previously issued any significant interpretive guidance on systemic pay discrimination.

The OFCCP noted that, in the late 1990's, several regions began to use a controversial "grade theory" approach, wherein it was assumed that employees were similarly situated with regard to evaluating and comparing their compensation if the contractor had placed their jobs in the same pay grade. Under Title VII, of course, similarity in job content, skills and qualifications involved in the job, and responsibility level are crucial determinants of whether employees are similarly situated for purposes of a compensation comparison. The pay grade theory, in contrast, results in a comparison of groupings of employees who are in the same pay grade even though the employees perform dissimilar work.

OFCCP has now stated clearly that it has discontinued use of the pay grade method of analysis; the basic assumptions involved with the pay grade theory do not comport with Title VII's standards concerning whether employees are similarly situated. The OFCCP interprets Executive Order 11246 and the Sex Discrimination Guidelines as "prohibiting systemic compensation discrimination involving dissimilar treatment of individuals who are similarly situated, based on similarity in work performed, skills and qualifications involved in the job, and responsibility levels." While an employer's preexisting groupings, such as job families or even pay grades, may provide some indication of similarity in work, they are not dispositive and the OFCCP will not assume that these groupings reflect similarly situated employees.

Additionally, OFCCP will use the statistical technique of "multiple regression" in analyzing an employer's pay system for potential discrimination. Multiple regression analysis should allow for the consideration of other variable "legitimate factors" affecting compensation such as years of experience, education, and performance ratings. In completing this multiple regression analysis, OFCCP will investigate the facts of each particular case to ensure that factors included in the regression are legitimate and untainted by unlawful discrimination.

Findings of systemic compensation discrimination must be based on disparities that are "statistically significant." A compensation disparity will not be statistically significant under the new standards unless it is at a level of two or more standard deviations, based on measures of statistical significance that are generally accepted in the statistics profession.

OFCCP states that it will seldom make a finding of systemic discrimination based on statistical analysis alone; instead, it will seek anecdotal/factual evidence that might support the statistical evidence.

With regard to the procedure for evaluating compensation practices, OFCCP will investigate contractors' and subcontractors' compensation practices to determine whether there is systemic pay discrimination under these standards. Using these standards, OFCCP will issue a Notice of Violations alleging systemic pay discrimination. OFCCP will attach the result of the regression analysis to, and summarize any anecdotal evidence in, the Notice of Violations issued to the contractor or subcontractor.

Additionally, the OFCCP has issued proposed guidelines for self-evaluation of compensation practices. In 2000, OFCCP adopted a requirement that covered contractors evaluate their compensation systems to determine whether there are gender, race, or ethnicity-based disparities. OFCCP has not, however, previously provided guidance to contractors on suggested techniques for compliance with this compensation self-evaluation requirement. The proposed guidelines provide that if an employer engages in a self-evaluation program that meets OFCCP guidelines, OFCCP will consider the contractor's compensation practices to be in compliance with Executive Order 11246. In essence, if an employer follows the same methodology that the OFCCP would follow in trying to determine if systemic pay discrimination exists and the employer has remedied any adverse findings, the OFCCP would find the employer in compliance. Of course, OFCCP is not prohibited from confirming compliance and checking the methodology.

In recognition of the concern of many employers that engaging in a self-evaluation may produce evidence that may be construed as an admission of wrong-doing, the OFCCP recognizes that some self-evaluation practices may be subject to the attorney-client privilege. For employers who take that position, the OFCCP will accept a signed certification of compliance that meets certain standards in lieu of producing the methodology and results of its compensation self-evaluation analysis to OFCCP during a compliance review. For contractors that elect to certify compliance with the requirement to conduct an annual self-evaluation of compensation practices, the OFCCP will evaluate their compensation practices without regard to the analysis or results of their compensation self-evaluation systems.

The complete notice and the procedure for offering comments may be found in the Federal Register at 69 FR 67246. The proposed guidelines for self-evaluation may be found at 69 FR 67252. Please contact Donna Brooks (205/226-7120) if you would like for us to provide a copy of these materials to you.

WAGE AND HOUR TIP: NEW REGULATIONS 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 the new "white collar" regulations have been effective for over two months, it appears that many employers have not completed a review of their exempt positions to ensure that employees are properly classified. Also, because factions of Congress are attempting to prevent the entire regulations from remaining in effect, many employers are unsure about what action to take at this time. Even though an amendment limiting DOL's ability to administer the new regulations was included by the Senate in the FY-2005 appropriation for the Department of Labor, it is my understanding that the amendment was not a part of the bill that was passed and sent to the President for his signature.

Employers should continue to review the duties of positions that they categorize as exempt to ensure that these positions are correctly classified. In view of the results of the November 2nd election, I doubt that the new Congress will proceed with attempts to change the regulations. According to information I have received, the Wage and Hour Division has instructed its investigators to enforce the new regulations since they are now in effect. Thus, employers should realize that they will be held to the requirements of the new regulations until or unless they are changed. Further, as the new regulations are now in effect, I expect that very soon there will be some private litigation filed concerning the definitions set out in the new regulations.

The debate continues as to whether the new regulations help or hurt workers. The Department indicates that it believes that only additional 130,000 additional employees will become exempt under these new regulations while 1.3 million more employees will become nonexempt. Other sources suggest that as many as 6 million additional employees will become exempt under the new rules. In talking with employers it appears some lower level management employees will no longer be exempt because they fail to make a salary of at least $455 per week even though most exempt employees already make at least that amount. However, it also appears that additional employees will meet the duties requirements for exemption under the new regulations.

On another note, several states considered whether or not to increase the minimum wage during the last election cycle. For example, Florida (by over a 70% margin) voted to institute a $6.15/hour minimum wage for all employers and employees that are subject to the Fair Labor Standards Act. Florida's act, which becomes effective in six months, also requires that tipped employees be paid $3.13/hour rather than the $2.13 required by the FLSA. In the future Florida's minimum wage will be adjusted annually based on the Consumer Price Index.

Summarized below are recent Wage/Hour and Family and Medical Leave Act decisions:

1. The Sixth Circuit ruled that Honda of America Manufacturing, Inc. violated the FMLA when it required an employee who had been on leave to wait one month before she was allowed to return to work. The employee received medical clearance to return to work on June 26 but Honda stated that no positions were available until July 31. **The court stated that Honda should have followed the DOL regulations, which require the employee be returned to work within two business days after the employee indicates that he or she is able to return to work.** The court also stated that employers could require medical clearance before allowing an employee to return to work.

2. In a separate case a district court found that Honda violated the FMLA when it extended the Attendance Improvement Program (AIP) for an employee who had used FMLA leave. The employee's attendance had fallen below 98% and the employee was placed in a six-month AIP. During this period the employee took FMLA leave and his AIP was extended by the number of days he was on leave. The court held that the extension interfered with the employee's rights under the FMLA. **Employers must make sure that no action is taken against an employee because of absences incurred due to the employee being on FMLA leave.**

3. In a Wage and Hour case, an Alabama federal court refused to certify a "collective

action" case against Rite Aid Corp in a suit brought by some management employees. While the named plaintiffs worked as managers and assistant managers in Mississippi and Alabama the case sought to represent a nationwide (excluding California) collective action. The court stated that, although these employees allege that they had nonexempt duties that entitled them to overtime, their only commonality (one of the requirements for a collective action) was that all of the employees were involved in management. The case of the named plaintiffs will continue.

4. The long running California case of Farmers Insurance adjusters has finally been resolved. A jury previously determined that the adjusters were not exempt and awarded back wages in excess of $90 million to the firm's California employees. With accrued interest and attorney fees the total cost to Farmers is expected to exceed $200 million. A Portland, Oregon court has ruled that some claims adjusters in that state are also due overtime and another case is pending for Farmers adjusters nationwide. Although DOL, in the new regulations, discussed how adjusters could be exempt, a district court in Washington, D.C. found adjusters nonexempt under the new regulations because their primary duty was not management.

Both Fair Labor Standards Act and Family and Medical Leave Act litigation continues to be prominent. Therefore, employers should be keenly aware of their potential liability and make sound efforts to comply with these statutes to the best of their ability. If we can be of assistance do not hesitate to contact me.

EEO TIP: BEWARE OF DISABILITY TRAPS

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.

On November 3, 2004 the U.S. Equal Employment Opportunity Commission (EEOC) reported that it had won a $1,290,000 jury verdict in the U. S. District Court for the Eastern District of Louisiana against E. I. DuPont De Nemours & Company ("DuPont") in a case filed under the Americans With Disabilities Act of 1990 (ADA). The jury verdict included $1,000,000 in punitive damages, $200,000 in front pay, and $91,000 in back pay on behalf of the plaintiff, Laura Barrios, an 18-year employee with severe physical impairments who was involuntarily forced into early disability retirement. Ms. Barrios will also be allowed to collect her costs and a reasonable attorneys' fee.

During her tenure with DuPont, Ms. Barrios, worked as a lab operator, lab trainer, lab clerk and, most recently, as a secretarial employee. At trial it was determined that although Ms. Barrios had severe scoliosis of the lumbar spine, lumbar disc disease with sciatica, lumbar spinal stenosis with compression neuropathy, neurogenic bladder, cervical spondylosis, previous cervical disc disease with surgical fusion, and reactive depression, she was able to perform the essential functions of her various jobs. Nonetheless, a DuPont Plant physician placed Ms. Barrios on extensive work restrictions in 1996 although there was no medical evidence that such restrictions were needed.

Finally, in 1999 Ms. Barrios was required to take a "Functional Capacity Exam" (FCE) to determine her general fitness for continued employment. The FCE included climbing, standing for hours, lifting of more than 20 pounds, and leg lifts. Even though Ms. Barrios passed the test, DuPont noted that she had some difficulty in walking and assumed that she would not be able to evacuate the plant in case of an emergency. On that basis, DuPont determined that Ms. Barrios should be involuntarily placed on permanent disability retirement thus, terminating her employment.

According to the EEOC, DuPont violated the ADA by requiring Ms. Barrios to take an FCE which was neither job-related nor consistent with business necessity. Additionally, the EEOC alleged that the examination, which took five to six hours to complete, caused Ms. Barrios severe physical and emotional harm. Apparently the jury agreed with

the EEOC and awarded Ms. Barrios the back pay, front pay and punitive damages indicated above. It is not clear whether DuPont will appeal.

Perhaps the key lesson to be learned from this case is that "Disability" does not necessarily mean "inability" when it comes to an employee's performance of the essential functions of a job.

DuPont seemed somewhat confused as to the proper standard to apply in assessing the results of its own Functional Capacity Examination. By passing the FCE, even though it was not specifically related to her current position, Ms. Barrios demonstrated that she could perform the essential functions of at least a general class of jobs. This should have alerted DuPont to take a closer look at her abilities in connection with her current position. Instead, DuPont was somewhat dismissive of her abilities and focused in on one of her impairments, her inability to walk stably. Since walking is a major life activity which, if substantially limited, qualifies an individual as having a disability under the ADA, DuPont's approach played right into the hands of the EEOC. Under current case law, DuPont would have been obligated to provide a reasonable accommodation, not terminate her, assuming Ms. Barrios was otherwise qualified for her current position.

Employers should not assume that all applicants or employees with a given disability are in need of the same accommodation. Indeed, individuals with similar disabilities often need very dissimilar accommodations depending upon their individual abilities or circumstances. By using a careful case-by-case approach to disability matters and by being objective as to the results of any functional capacity test, an employer can avoid a costly, adverse decision if the matter goes to court.

OSHA TIP: OSHA, EVACUATION AND EXITS

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 failure to ensure that workers could be safely evacuated in the event of fire or other emergency has resulted in some major tragedies. The loss of lives perhaps made more tragic in that a simple act, keeping exit doors unlocked, could have saved many.

On March 25, 1911, one of the most notable examples of such a tragedy occurred at the Triangle Shirtwaist Company in New York. A fire in this ten-story, fireproof building claimed the lives of 146 workers, mostly young women and girls between the ages of 16 and 23. Finding themselves trapped, many of the victims opted to jump to their deaths to escape the flames. This awful decision was forced by, among other conditions, locked exit doors. Accounts of the incident suggest that doors were locked to control stealing.

This event served as a catalyst for a number of safety laws. However, stringent fire codes and OSHA enforcement have not eliminated other workplace fire tragedies.

History was repeated to an extent at the Imperial Foods plant in Hamlet, North Carolina, on September 3, 1991. The structure wasn't the same type and the number of victims (28) was not as great, but again, locked exit doors contributed to the loss of lives. Apparently the doors at the North Carolina plant were also locked to prevent stealing. With the reminder of the Hamlet incident and knowing the potential for such tragedies, you are assured that OSHA will not overlook emergency exit requirements in its inspections. Note the following references taken from agency press releases:

"OSHA issued one alleged willful citation to the company, with a proposed penalty of $55,000, for failing to provide night-shift employees with an emergency exit."

"A mattress retailer's repeated failure to ensure quick emergency exit access for workers a its warehouse facilities….has resulted in $140,000 in fines."

You should ensure that all components that relate to building evacuation in an emergency

are high on your safety checklist. Always maintain exits and exit routes that are free and clear of obstructions and properly marked with signs. It should be noted that the holiday season often finds exits obstructed with additional merchandise and displays. It is also vital that employees know the fire prevention and emergency action plans for their workplace.

See OSHA's topic on "Fire Safety" and its eTool on "Emergency Evacuation Procedures" at www.osha.gov for further information and guidance.

WORKER'S COMPENSATION RELEASE FAILS TO COVER RETALIATORY DISCHARGE CLAIM

Employers using a generic release to cover workers' compensation benefits and retaliatory discharge claims need to be sure the language of the release complies with the legal standards of the state where the injured employee worked. This point was illustrated in the recent case of *Borque v. TrueGreen, Inc.*, (11th Cir. November 15, 2004).

The employee was injured in September 2002 while working as a courier in the Miami vicinity. He was terminated one month later. In March 2003 he filed a retaliatory discharge lawsuit, using a different attorney than the one who had handled his workers' compensation claim. He settled his workers' compensation benefits for $8,300.

The workers' compensation claim settlement included language that the agreement "is intended to be a complete, entire and final release and waiver of any and all rights to any and all past, present and future benefits. . . in any other actions, claims, demands or causes of actions that the employee/claimant may have against the employer." Furthermore, the agreement is "in full satisfaction of the obligation or liability of the employer to pay any and all benefits of whatever kind or classification available under the workers' compensation law." The district court granted summary judgment for the employer, but the Eleventh Circuit Court of Appeals reversed that decision.

According to the court, Florida legal precedent "made clear that mere reference to rights and benefits under the Workers' Compensation Law is insufficient to waive a claim for retaliatory discharge." **According to the court, the language in the settlement claim "does not clearly manifest the intent" to release the company specifically from the retaliatory discharge claim.** In fact, the court stated that certain portions of the release agreement appear inconsistent with the release of a retaliatory discharge claim.

What is the lesson for employers? Be specific about the claims that are released. Although the general "catch all" language usually works, the employer should specify claims that are released which could likely arise out of the incident resulting in the original settlement. For example, a release covering an injured employee who has been terminated should specifically refer to a claim of retaliatory discharge under state workers' compensation law; do not rely on the "catch all" language to protect your organization from that claim. Additionally, we strongly advise that you seek competent legal counsel to review and/or prepare any release as this is one area where a focus on details and the current state of the law will likely pay off.

DID YOU KNOW . . .

. . . that a New Jersey jury on November 15, 2004 awarded a plaintiff $2.8 million in a sexual orientation harassment case? *Caggiano v. County of Essex*. Caggiono, a lesbian, was one of two women out of 53 employees in the office. There was repeated harassment, which she reported. Those who engaged in harassment were not disciplined, nor did the harassment stop. The jury considered the employer's investigation a "whitewash," and as a result of the investigation she suffered retaliation from her peers.

. . . that bad attitude remains as good a reason as any to terminate an individual, even if the individual claims discrimination? *Herron v. DaimlerChrysler Corp.*, (7th Cir., November 3, 2004). Although Herron did his job well, he received in writing repeated counseling and

warnings for his poor behavior toward his peers. According to the court, "persistent, significant problems with his treatment of his co-workers, superiors, and subordinates obscured Herron's continued good production." The court added that Herron was not subjected to racial harassment or discrimination; "his problems on the job were not related to his race – they were related to him. The fact that he is a member of a protected class does not transform them. This alone dooms his racial harassment claim." The employer had followed the principles of progressive discipline regarding behavior, providing objective facts for its examples of his behavior and attitude problems with peers, subordinates and direct reports. Remember that when holding employees accountable for behavior and attitude, give objective examples (facts) to support your assessment.

. . . that a military reservists' estate did not have a cause of action against an employer who returned the reservist to work without rest after fulfilling military duties? In a case of first impression under the Uniformed Services Employment and Re-Employment Rights Act of 1994, the third circuit in *Gordon v. WAWA, Inc.*, (October 28, 2004) rejected a family's claim that the deceased reservist was entitled to eight hours rest at the conclusion of his weekend reserve duties before returning to work. Gordon was scheduled to return to work at his regular night shift upon completion of weekend duties. Driving home at the end of his shift, he fell asleep, crashed his car and died. The court stated that the eight hour time frame specified in USERRA covering the time between completion of service and return to the employee's residence is not considered a time of rest, but a time of travel. Accordingly there is not an independent right to eight hours rest between completion of service and reporting back to work.

. . . that a non-union employee was illegally terminated for distributing fliers critical of company layoff decisions? *United States Services Auto Association v. NLRB,* (D.C. Cir., November 9, 2004). The circuit court of appeals upheld the NLRB determination that the employer's policy regarding solicitation and distribution were overly broad and presumptively invalid. The policy stated that distribution may not occur "at any time in the work area and only during non-working hours in non-work areas." The employer's policy would have been permitted if it addressed "working time," rather than working hours.

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.