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

Employment Law Bulletin

To Our Clients And Friends:

The U.S. Supreme Court on March 30, 2005 extended the disparate impact theory to age discrimination cases. This brings to the forefront age-related employment issues facing employers today and in the future. In the case, *Smith v. Jackson, Mississippi*, **the Supreme Court ruled that age discrimination plaintiffs could assert that an employer policy or practice which is neutral on its face can have a "discriminatory effect" based upon age**. In the Jackson case, the neutral factor was the city's decision to increase by a higher amount the pay for entry-level police officers with less than five years of seniority. The plaintiffs in the case had more than five years seniority and were in the protected age group (40 years or older). According to the Supreme Court, if plaintiffs can show that a neutral factor has a discriminatory effect based upon age, the employer then is required to show that the neutral factor is based on a reasonable factor other than age. In the Jackson case, the reasonable factor other than age was the desire for the city to be more competitive with neighboring municipalities for entry-level officers.

The disparate impact theory under Title VII is a stronger standard for an employer to justify. Under Title VII, when a discriminatory impact is shown, the employer must substantiate that the discriminatory factor is required by "business necessity" and other approaches with a lesser impact to accomplish the same business objective are unavailable.

Here's the impact of the city of Jackson case for employers now and in the future: **Assume that your business has a workforce reduction or reorganization need and you decide to use the performance appraisal ratings for the past two years or the production records for the past two years as determining factors for who is retained or laid off. If there is a "discriminatory impact" on individuals 40 or older when using those factors, the U.S. Supreme Court decision means that those individuals may pursue an age discrimination claim based upon that theory.** The employer then would need to show how those factors for selecting employees for lay-off are reasonable factors other than age.

Here's another example of how this case can affect employer practices. A term called "Boomerangers" is used for those individuals who retire and then desire re-employment. If an employer determines that it will only consider candidates who were recently employed, then rejected applicants 40 or older may assert a "disparate impact claim" that such requirements adversely affect them compared to younger applicants.

Approximately half of the U.S. workforce is 40 years old or older. Though claims of race and sex discrimination lead the way numerically in our country, followed by disability claims, we expect age discrimination claims to increase based upon the demographic changes to our workforce and the "discriminatory impact" theory available to pursue an age discrimination claim.

NURSE'S RELIGIOUS COMMENTS JUSTIFIED TERMINATION

As religion has become an increasing area of focus nationally, it has also become an increased area of focus in the workplace. Religious accommodation issues of years ago regarding time off or clothing have been supplemented by more difficult ones for employers to address, such as an employee's religious beliefs that require proselytizing to others or refusing to perform certain job duties for religious or moral reasons. In the case of *Morales v. McKesson Health Solutions, L.L.C* (10th Cir., March 22, 2005), a nurse was terminated after prior warnings because of her persistent religious comments to patients.

The employee handled telephone calls from patients and placed them in different risk categories for further consultation and treatment. According to the court, "In disregard of McKesson's procedures and, we are told, occasionally instilling fear in McKesson's patients, Morales injected Roman Catholic prayer and dogma into triage calls. Morales persisted in making religious comments that callers apparently found scary or offensive." **Morales was issued a written warning in which she was told to refrain from making religious comments to patients. She refused and, upon termination, alleged that she was retaliated against because of expressing her religious beliefs or practices.**

Under Title VII, an employer is required to attempt to accommodate an employee's religious beliefs, observances and practices, unless to do so will create an undue hardship for the employer. One example of an undue hardship is the expression of beliefs to others, whether non-employees (patients or customers) or other employees. For more information about issues regarding religion in the workplace, attached is a copy of the outline from a talk Richard Lehr gave in Los Angeles, California on April 14, 2005 addressing the same subject. Please contact us for a mailed copy.

BE CAREFUL WITH E-MAIL: IT WAS EVIDENCE IN A $29.2 MILLION SEX DISCRIMINATION AWARD

The largest individual award for sex discrimination and retaliation occurred on April 6, 2005 in New York, when $29.2 million was awarded to the plaintiff in *Zubuake v. UBS Warburg L.L.C*. The plaintiff alleged that she was discriminated against in promotion opportunities and terminated in retaliation for speaking up about the same. She was awarded over $20 million in punitive damages, $8.8 million in front pay and $2.2 million in back pay.

Critical to her case was the trail of e-mail communications establishing the company's motive to "get even" after she filed her discrimination charge regarding promotions. For example, shortly after she filed her discrimination charge, a senior manager sent an e-mail to the human resources director stating that the company should "exit her a.s.a.p".

We're not suggesting that had those comments been verbalized rather than written it would have been appropriate, but our observation is that employers often are careless regarding e-mail communications, treating e-mail as a form of conversation that is not recorded or retained or which could be denied. Treat e-mail communications with the same care as written memos: focus on facts, not opinions, and do not be flippant in communications about other employees. Furthermore, any verbal or written communication that conflicts with the organization's fair employment practices, harassment, and retaliation policies should be dealt with immediately, even if the speaker or writer is "letting of steam" rather than really meaning it.

STEELWORKERS AND PACE MERGER APPROVED; WHAT NOW?

The Paper Allied-Chemical and Energy Employees on April 12, 2005 voted to merge with the United Steelworkers of America. The combined union, known as the United Steelworkers, will become in the words of its president, Leo Gerard, the "largest kick-ass union in North America". The day after the merger was announced, former PACE president Boyd Young announced his retirement effective July 2005.

According to comments from Boyd Young to the 5,000 delegates on April 14, 2005, corporate America can either work with the union, and the union will be its friend, or work against the union, and the union will "put you at a competitive disadvantage". The new Steelworkers union expects to focus on worker health and safety issues. The Steelworkers also signed alliances with unions in Brazil and Mexico to coordinate internationally organizing and bargaining objectives. According to Leo Gerard, there is a war going on world-wide between companies and employees and "we can't win this war by negotiating the best contracts here in the United States. We need to link arms with workers everywhere to raise their standards".

OSHA TIP: OSHA AND MISINFORMATION

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.

It's likely a safe bet that, given a choice, most employers would prefer not having a visit from an OSHA compliance officer. Should you have a high injury/illness rate or fall in one of the agency's targeted programs, you may have had the experience and can anticipate having it again. **For many employers, however, exposure to personal encounters with OSHA arises from the filing of a safety or health complaint. It's possible that sometimes understanding the complaint handling system may help ward off an onsite inspection.**

Section 8(f)(1) of the OSH Act states that "any employees or representatives of employees who believe that a violation of a safety or health standard exists that threatens physical harm, or that an imminent danger exists, may request an inspection by giving notice to the Secretary or the authorized representative of such violation or danger." Historically, the agency has struggled to afford employees the right to have their complaints inspected while not wasting resources on frivolous or unfounded complaints. The General Accounting Office (GAO) investigated and issued a report dated June18, 2004 entitled "OSHA's Complaint Response Policies" in which they made recommendations for improving the system. OSHA noted that a revision of its directive on complaint policies, CPL 02-00-115, had been initiated prior to GAO's review and is expected to be issued in fiscal year 2005.

OSHA's initial approach tended to result in on-site inspections of complaints when the formality requirements were met. A significant change in complaint handling procedures was established by the agency directive issued in 1996. This approach allowed many complaints to be handled by "phone and fax." The employer is contacted by telephone and advised of the alleged hazards at the worksite. This information is then telefaxed to the employer with the instruction to investigate the items and advise OSHA of corrective actions or why no corrective actions were required. A timely and satisfactory answer will likely close the issue while a failure to respond may result in an on-site inspection.

A good way to encourage OSHA complaints is to ignore employee concerns when they are voiced within the company. Having a system in place that not only allows but encourages legitimate safety concerns to be expressed will reduce the likelihood of OSHA involvement. This is particularly true where employees see that problems are fixed when they are identified.

Be thankful when the complaint is conveyed by telephone, fax and/or mail rather than personal delivery by a compliance officer. At this point your action or inaction can largely determine whether the complaint leads to an on-site inspection. Remember that when the inspector comes onsite to check out the complaint, other items within plain view may also be observed and cited. A timely, thorough and well-documented response to OSHA's letter will likely close the matter. OSHA will provide your response to the complainant who can dispute your account or disagree that hazards were eliminated. But when compelling evidence has been provided OSHA in your response, further action may not be required.

WAGE AND HOUR TIP: WAGE HOUR HIGHLIGHTS

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.

Who are employees? The Fair Labor Standards Act defines employ as "suffer or permit to work" and the courts have made it clear that the employment relationship under the FLSA is broader than the traditional common law concept. **Mere knowledge by an employer of work done for him/her by another is sufficient to create the employment relationship under the FLSA**. Many employers attempt to treat all persons other than full time employees as independent contractors. However, to do so, can be very costly in many instances.

While the U.S. Supreme Court has indicated there is no single rule or test for determining whether an individual is an independent contractor or an employee, it has listed several factors that must be considered. No one factor is seen as controlling, but one must consider all of the circumstances:

1. The extent to which the services rendered is an integral part of the principal's business
2. The amount of the alleged contractor's investment in facilities and equipment
3. The alleged contractor's opportunities for profit and loss
4. The nature and degree of control by the principal
5. The amount of initiative, judgment or foresight in open market competition with others
6. The permanency of the relationship

Further the court has said that the time or mode of pay does not control the employee's status.

There are several areas that have caused employers problems:

- The use of so-called independent contractors in the construction industry
- Franchise arrangements, depending on the level of control the franchiser has over the franchisee
- Volunteers - A person may not volunteer his/her services to the employer to perform the same type of service performed by an employee of the employer
- Trainees or students
- People who perform work at their home

As we approach the season when schools are not in session, many students will be seeking employment and some students, in order to gain experience in their field, may ask to work as an intern or volunteer without pay. In some situations it has been determined that persons may participate in such training without creating an employment relationship. However, I recommend that you be very cautious in letting students participate in this type of training unless the student is studying a particular course that requires an internship.

The Supreme Court has held that the words "to suffer or permit to work" as used in the FLSA to define "employ", do not make all persons employees who, without any express or implied compensation agreement, may work for their own advantage on the premises of another. Whether trainees are employees of an employer under the FLSA will depend upon all the circumstances surrounding their activities on the premises of the employer. **If all of the following criteria are met, the trainees or interns are not employees within the meaning of the FLSA:**

- The training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school
- The training is for the benefit of the trainees or students
- The trainees or students do not displace regular employees, but work under their close observation
- The employer that provides the training derives no immediate advantage from the activities of the trainees or students, and on occasion his/her operations may actually be impeded
- The trainees or students are not necessarily entitled to a job at the conclusion of the training period
- The employer and the trainees or students understand that the trainees or students are not entitled to wages for the time spent in training

Below are some areas where the Department of Labor has determined that interns and trainees are not employees and therefore do not have to be paid the minimum wage:

- Graduate students in a doctorial program in biomedical sciences are engaged as research assistants at the institution and work under the supervision of faculty members. They are not charged tuition or admission fees and are furnished books and materials as needed. In addition, the students are paid a stipend of $18,000 + per year
- Administrative Residents in graduate school programs that are serving a 12-month residency in a hospital. The resident is enrolled in college, the Hospital Administrator is normally a faculty member and the student may receive a stipend from the hospital
- Medical School Externs – Persons in their senior year of medical school may work in the hospital for short periods (sometimes six weeks) in one of the

medical departments such as surgery, medicine or obstetrics. Since the training is primarily for the benefit of the student, Wage Hour does not assert that he/she is an employee of the hospital to which they are assigned

Conversely, the Department of Labor determined that a one or two month internship program for people who have completed a hostel management training course to be employees. The responsibilities of the interns were to assist in the daily operation of the youth hostel, to check hostellers in and out, to perform some maintenance and administrative work, to be involved in the establishment/design of educational and interpretive programming for the hostel, and to report to the manager of the hostel who would be their supervisor. The interns worked 25 hours a week and were given free rooms at the hostel so that they could feel what it is like to stay in a youth hostel.

In order to limit the liability, an employer should look very closely at individuals that are considered to be independent contractors to make sure that they are not creating a potential liability. With respect to any interns, the employer should consider having the intern furnish a written copy of any training requirements the intern must complete in order to obtain the degree and seek legal advice prior to allowing the intern to perform the training duties. If we can be of assistance do not hesitate to call us.

Employers with operations in Florida should be aware that effective May 2, 2005 a state minimum wage of $6.15 per hour will take effect. Tipped employees must receive a cash wage of $3.13 per hour plus sufficient tips to ensure they are earning at least $6.15 per hour.

NO FMLA LIABILITY FOR EMPLOYEE WHO WOULD HAVE BEEN TERMINATED ANYWAY

The case of *Throneberry v. McGehee Desha County Hospital* (8th Cir., April 11, 2005) involved a nurse who was terminated during her FMLA absence. While out on FMLA leave at the employer's suggestion, Thorneberry showed up for work, was disruptive to other employees, and was dressed inappropriately. Her family members were called to remove her from the hospital. She was asked to resign, and upon her resignation, the employer discovered that Thorneberry had inappropriately billed Medicare, costing the hospital $40,000.00.

In upholding the employer's actions and reversing a jury's verdict in favor of Thorneberry, the court of appeals stated that **"The FMLA's plain language instructs or dictates that if an employer were authorized to discharge an employee if the employee were not on FMLA leave, the FMLA does not shield an employee on FMLA leave from the same, lawful discharge."** If an employer is accused of interfering with an employee's FMLA leave by initiating a termination decision, the court said the U.S. Department of Labor regulations "make clear that the employer would have the burden of proving that an employee would have been laid off during the FMLA leave period, and, therefore, would not be entitled to restoration." Employer FMLA policies should include a statement that an employee will return to his or her position at the time leave began, unless the employee otherwise would have been laid off, transferred or terminated.

DID YOU KNOW . . .

…that on April 19, legislation was introduced in Congress to require union recognition based on a majority of employees who sign authorization cards? Known as the Employee Free Choice Act, the bill would require for an initial contract mediation and arbitration in the event an agreement is not reached within 90 days after authorization. The bill would also provide for up to $20,000.00 in penalties per violation for unfair labor practices. This bill is identical to legislation that was introduced in 2003 and which never came to the floor for a vote.

…that FMLA benefits cost employers $21 billion in 2004? This figure is based upon a survey conducted by the Employment Policy Foundation and released on April 19, 2005. The survey involved 110 companies covering over 500,000 employees. The total figure includes the amount employers paid for health care coverage continuation ($5.9 billion), the amount it cost employers to cover for the absent employees ($10.3 billion) and lost productivity ($4.8 billion). Furthermore, 14.5% of the employees at surveyed employers took FMLA leave for an average of 10.1 days each.

…an employer violated the Americans with Disabilities Act when it denied reinstatement to an employee because 25 years earlier he was "permanently disabled" on the job? A jury awarded the former police officer $150,000.00 on April 4, 2005. *Knight v. Metropolitan Government of Nashville*. The department had a policy that anyone who was absent and receiving a disability pension would not be eligible for re-employment. At the time Knight re-applied, he no longer had a disability.

…that the United States Department of Labor on April 5 announced that it will issue revised FMLA regulations? DOL has not given a date for the release of these regulations. They will focus on what illnesses should be considered a serious health condition and whether intermittent leave should remain where the employee can use it in increments of minutes, rather than hours. The AFL-CIO is pushing to expand the FMLA to smaller employers.

…that a court upheld an $11.2 million arbitration award against an individual in violation of his non-compete and no solicitation agreement? *CACI Dynamics Systems, Inc. v. Spicer* (E.D. VA, March 20, 2005). The damages award was under a Virginia statute that tripled the amount of damages for violation of a non-compete agreement. Enforcing the non-compete agreement was governed by mandatory arbitration. The arbitrator concluded that the employee breached his duty of loyalty, interfered with the company's relationships with its customers and violated the Virginia Business Conspiracy Act.

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