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July 2005
Volume 13, Issue 7

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

Employment Law Bulletin

To Our Clients And Friends:

Your insurance coverage may preclude your company from selecting the law firm it wants and knows, unless your company is proactive with its insurance carrier. Several insurance products provide coverage for employment claims. Certain products, referred to as employment practices liability insurance, cover a broad range of employment disputes, including discrimination charges and litigation. These types of disputes may also be covered as part of an employer's directors and officers liability insurance. **However, many insurance policies leave it to the insurance company -- not you -- to select the attorney it wants to defend these claims.** The attorney the insurance company selects may not necessarily be the attorney who works regularly with you and your colleagues. Unfortunately, employers too often first learn this when a claim arises and they request that their usual employment counsel defend the claim.

The following suggestions can help you protect your company's right to choose its counsel to defend such claims:

1. **Be sure your broker knows that a condition of your company doing business with an insurance company is the right to select your own counsel.** Insurance companies often accommodate this request, and ask for information about your law firm so that they can contact the firm and establish a relationship.

2. **The problematic time to request your preference of counsel is after a claim has arisen.** Therefore, do not wait until its too late; establish now with the insurance company your right to appoint your law firm and make the insurance company aware that if they do not accept your firm, you will shop for other products and companies. There are several insurance companies offering employment practices coverage and you may find that shopping your coverage leads to not only your right to choose your own counsel, but also a more

favorable rate.

3. **Our firm is panel counsel for insurance companies and has been approved by several insurance companies,** but some clients have been disappointed to find that there are situations where an insurance company refuses to budge from insisting that its firm handle the matter, rather than us. We can provide you and your broker with information about the several insurance companies we work with and which no doubt would be interested in your business.

13 MILLION MINUS 4.5 MILLION EQUALS: NEW AFL-CIO MEMBERSHIP

The departure from AFL-CIO during the week of July 26, 2005 of the Service Employees International Union (1.8 million members), Teamsters (1.4 million members), and United Food and Commercial Workers (1.3 million members) not only reduced the membership of the AFL-CIO by over 30 percent, it also reduced the AFL-CIO annual dues revenue from $96 million to less than $70 million, which will result in layoffs, and an increased cost for those who remain in the AFL-CIO.

The departing unions join the Carpenters, UNITE HERE, Farm Workers and Laborers in forming the Change to Win Coalition. The Coalition's first annual convention is scheduled for September 27, 2005 in Cincinnati, where several Coalition unions are participating a national organizing effect directed toward Cintas.

As we've described in previous issues of the Employment Law Bulletin, **the split from the AFL-CIO was over direction and philosophy. The unions that left believe that organizing, rather than political action, is the way to gain clout in the marketplace to improve employee wages and benefits.** The Coalition also believes that fewer but more powerful unions are essential to changing the 30-year decline of private sector union membership, to a current record low 7.9 percent.

What does this mean for employers? Good news and bad news. **The good news is that labor's political clout is weakened. There's no longer a unified labor movement with political muscle disproportionate to its' membership. The bad news for employers is that the Change to Win Coalition and remaining AFL-CIO unions are determined to organize non-union employers.** Approaches they will use include focusing on companies where they have bargaining agreements at some locations, but not all. In such situations, unions may pursue a "top-down" strategy, whereby they pressure company executives and boards to take a "neutral" position to unionization, rather than organizing from the "ground up". Employers that are most vulnerable to this pressure are those with an identifiable consumer product.

Union free employers and employers with unionized and non-unionized sites may have become complacent about the risks of unionization. Now is the time for those employers to assess their vulnerability to organizing, including the "top-down" corporate campaign strategies.

WORKPLACE ROMANCE BY SUPERVISOR CREATES HOSTILE WORK ENVIRONMENT

We advise employers to require supervisors and managers to adhere to a "touch and go" policy regarding becoming involved with subordinates at work. That is, "you touch or try to touch, you go", even if the subordinate initiates or welcomes the behavior. The case of *Miller v. Department of Corrections* (CA, July 18, 2005) is a good example of why employers should adopt such a policy.

A warden had sexual affairs with three women who reported to him, one of whom received a promotion. Other employees heard lovers quarrels between the warden and the women. Employees alleged the affairs created a sexually hostile work environment. In reversing the lower court rulings that granted summary judgment for the employer, the California Supreme Court stated that **"An employee may establish an actionable claim of sexual harassment…by demonstrating that widespread sexual favoritism was severe or pervasive enough to alter his or her working conditions and create a hostile environment".**

In quoting from an EEOC policy statement, the Supreme Court stated that "if favoritism based upon the granting of sexual favors is widespread in a workplace, both male and female colleagues who do not welcome this conduct can establish a hostile work environment in violation of Title VII, regardless of whether any objectionable conduct is directed at them and regardless of whether those who were granted favorable treatment willingly bestowed their favors". In essence, sexual favoritism can support a claim of hostile environment sexual harassment, ruled the court.

Employers have the right and the responsibility to hold supervisors and managers to a higher level of behavior than non-supervisory employees. In support of such a policy, employers should add the legal risks to the company to the philosophical belief that managers and supervisors should not become involved with people who report to them.

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.

The Department of Labor has not yet released the promised new FMLA regulations, even though there were indications they planned to do so by the end of May 2005. Stay tuned for an update if new regulations are proposed. Because both employer and employee representatives continue to weigh in on the issue, the administration is reluctant to create another firestorm similar to the one that raged when the new "white collar" exemption regulations were issued in 2004.

The U. S. Third Circuit Court of Appeals issued an opinion regarding the failure of an employee to follow the employer's sick leave policy while on FMLA leave. The employee was suffering with bouts of anxiety, which caused him to take significant amounts of sick leave. Because of these abuses, he was placed on the "sick abuse list". That policy required him to remain at home while on sick leave and to call a "hot line" when leaving home for any reason during the day. Even though he had been warned regarding this requirement, he was absent from home on two separate days when the employer checked on his whereabouts and he had not called the hot line. The employer imposed a four-day suspension, which the employee served when he returned from FMLA leave. The employee filed suit alleging the employer interfered with his FMLA rights. However, the court ruled that the sick leave policy did not prevent or discourage employees from talking FMLA leave. Further, the court stated that since the call-in procedure was not a pre-requisite to FMLA, the neutral call-in policy did not violate the FMLA.

There continues to be much activity under the Fair Labor Standards Act by both the DOL and in the courts. Recently, a group of store managers sued Family Dollar Stores in Tuscaloosa. The court allowed the case to become a collective action and approximately

1400 employees joined the suit. According to my understanding, if the court found for the employees, the firm would have been liable for about $45 million in back wages. After two days of deliberation, the jury could not reach a verdict, so the judge declared a mistrial.

With the recent arrival of the hurricane season, I feel it is a good time to remind employers of their potential liability if they require employees to remain on the premises during a severe weather alert. During October 2004, an Orlando hospital chain required its hourly employees to remain at work around the clock. Because of the employees' inability to get a minimum of 5 hours sleep the firm should have compensated these nonexempt employees for all of their hours. As a result, the employer was required by DOL to reimburse approximately 9000 employees $1.9 million. Employers should be very careful to ensure that employees who are on duty for 24 hours or more receive at least 5 hours of sleep if they are going to dock the employee for sleep periods. When employees are allowed to sleep, no more than 8 hours may be claimed as sleep time during a 24-hour shift.

Recently, the U. S. Supreme Court let an appeals court decision stand regarding the use of compensatory time by Cleveland, Ohio police officers. The city had been denying the officers the use of their comp time because to do so would have required the city to pay overtime to other officers that were needed to adequately cover shifts. The appeals court had ruled that the employer was not in compliance with the FLSA because allowing the officers to use their comp time would not "unduly disrupt" the operations of the department. Therefore, the officers were entitled to take their comp time. Public employers that have comp time plans should be aware that they could be required to pay one employee overtime to cover a shift while another employee is using comp time.

DOL continues its recent practice of issuing and publishing formal opinion letters that provide employers with guidance regarding certain enforcement policies. One recent letter dealt with truck drivers who transport merchandise from a warehouse to retail establishments after coming from another state. In this instance, the goods that arrived from out of state were held in the warehouse and were redistributed based on the needs of the store. DOL's position is that the goods remain in commerce until they reach the retail store(s) and therefore the truck drivers fall within the overtime exemption provided for drivers performing safety-affecting duties on goods moving in interstate commerce.

In another recent letter, DOL stated that an employer could not recover from the employee internal training costs that were expended while a police officer was attending a basic police course. During the two-month course, the employee was paid over $3,000 in salary and according to a state statute if the employee left his employment within one year either the employee or his new employer must reimburse his former employer the cost of the training. DOL stated that the employee could not be required to reimburse the training cost to the extent it would reduce him below the minimum wage and/or reduce his overtime compensation as the employee may not waive his rights to compensation due under the FLSA. However, DOL does state that the former employer could attempt to collect the training cost from the new employer as provided by the state statute.

The U. S. Seventh Court of Appeals has recently ruled for an employer by determining that employees at a nuclear power plant were exempt under the administrative exemption. The employees, who worked at five different plants, were work planners, supply analysts, staff specialists and first line supervisors. Prior to January 2000, the employees who were paid annual salaries ranging from $61,000 to $101,000, were classified as nonexempt. While this litigation commenced under the old regulations it appears that these employees

were determined to be exempt under the new regulations also.

An employer in the northeast had attempted to offset payments made for holidays, sick leave and vacation time against back wages that were due. However, the U. S. Third Circuit Court of Appeals says that such "creativeness" is not permissible. Further, the court stated that "just because an employer pays its workers for time that it is not required to pay under the FLSA does not mean that requirements of the federal wage and hour law can be ignored."

The August 2004 regulations seemingly relaxed the requirements for the outside sales exemption. The only requirement now is that the employee have a "primary duty of making sales…or obtaining orders…" and the employee "is customarily and regularly engaged away from the employer's place". Recently there have been a couple of novel issues raised regarding this exemption, which will very likely find their way into some litigation in the near future. First, it is being argued that unless the sale is closed in the customer's place of business it is not an outside sale. For example, even though the employee has called on the customer, if the sale is closed via Email, Internet or telephone then it is not an outside sale. Another argument being put forth is related to employees working from a "home office." The new regulations consider a "home or office" used by the salesperson to be one of the employer's places of business and consequently, an employee making sales from his home could be considered as nonexempt. In view of these arguments, employers should review their employment practices relating to salespersons to ensure that they qualify for the outside sales exemption.

There continues to be much private litigation under the Fair Labor Standards Act and the Family and Medical Leave Act. Therefore, employers should be very aware of their potential liability and make sure they are complying with these statutes to the best of their ability. If we can be of assistance do not hesitate to contact me.

EEO TIP: HANDLING RETALIATION – THE DIFFERENCE BETWEEN GETTING MAD AND GETTING EVEN

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.

When an employer receives that dreaded notice that a charge of employment discrimination has been filed against it, normally the first reaction is to get mad and seek retribution against the "ungrateful employee" who filed it. While that instinct is understandable, it could the worse thing an employer could do, especially at that time. Getting mad may be a way to vent the employer's frustrations, but what is more important is "getting even" by gathering all of the facts and handling the initial charge in a way that eliminates the probability of a retaliation charge in addition to the first charge. The reason for "keeping one's cool" is that when all of the facts are known, the initial charge may be baseless, but if the employer takes some adverse action in the heat of the moment, a retaliation charge may prove to be far more devastating.

Over the next two months we will present a series of articles on this topic. We will discuss in greater detail some of the pitfalls an employer may encounter in responding to a charge of retaliation, but we will also suggest some critical steps to take in order to avoid those pitfalls. That old adage "Don't get mad, get even" can be applied to the handling of a charge. Incidentally, by "getting even" we don't mean

doing something in an underhanded way. We mean gathering all of the facts that will put your company on an even keel, when it comes to the resolution of a charge.

The issue of retaliation keeps resurfacing because of the confusing standards of coverage, protected activity and what constitutes "an unlawful adverse employment action" against an employee (whether a trouble-maker or otherwise good employee) who files an employment discrimination charge, provides damaging information against the company in a state or federal investigation, or becomes a "whistleblower" and reports some allegedly illegal act by his or her employer. Not counting the myriad of state anti-retaliation statutes, there are at least **twenty (20) federal statutes,** which prohibit retaliation against applicants or employees in the employment context, or "whistle-blowers" in other contexts for reporting certain illegal acts by companies or employers as follows:

Employment Related Anti-retaliation Statutes:

Title VII of the Civil Rights Act of 1964	42 U. S. C., Section 2000e-3(a)
Age Discrimination In Employment Act	29 U. S. C., Section 623(d)
Americans With Disabilities Act of 1990	42 U. S. C., Section 12203
ERISA Act of 1974	29 U. S. C., Section 1140, 1141
Family & Medical Leave Act	29 U. S. C., Section 2615
The Federal Bankruptcy Code	11 U. S. C., Section 525(b)
Jury Service & Selection Act of 1968	28 U. S. C., Section 1875
National Labor Relations Act	29 U. S. C., Section 158
Rehabilitation Act of 1973	29 U. S. C., Section 794(d)
Civil Rights Act of 1866	42 U. S. C., Section 1981
USERRA Act of 1994	38 U. S. C., Section 4301 – 4333
The Fair Labor Standards Act	29 U. S. C., Section 201-219

Whistleblower Statutes:

The Occupational Safety & Health Act	29 U. S. C., Section 660 (c)
The Sarbanes-Oxley Act of 2002	18 U. S. C., Section 1514 A
The Railway Safety Act	45 U. S. C., Section 441
The Clean Air Act	42 U. S. C., Section 7622
The False Claims Act	31 U. S. C., Section 3730 (h)
Federal Water Pollution Control Act	33 U. S. C., Section 1367
Asbestos School Hazard Detection Act	20 U. S. C., Section 3608
Surface Transportation Assistance Act	42 U. S. C., Section 2305

It would be a monumental undertaking and far beyond the scope of this article just to summarize the critical, anti-retaliation components of each of the various acts listed above. Consequently, our discussion in this article will be limited to an analysis of the anti-retaliation provisions of Title VII. However, for information purposes, all of the statutes have certain provisions in common as follows:

- All have a limited, specific definition of the persons who are protected,
- All have limitations as to the kind of acts that are protected,
- Almost all, have provisions for the remedies or damages available to the complainant.

Thus, at the very outset, there are at least four basic questions that an employer should ask in responding to almost all retaliation claims arising in an employment context. For example:

1. **Does the employee meet the procedural prerequisites which would qualify him or her for coverage under the statute in question?** (e.g. Was the alleged retaliation against an applicant or employee as defined in the underlying statute?)
2. **Did the employee engage in "protected activity" under the statute in question?** (e.g. Was the employee's conduct protected by the "**Participation**" or "**Protest**" clause under Title VII, or some similar clause under the other acts?)
3. **Was the employee subjected to any "adverse employment action?"** (e.g. Did the alleged retaliation result in a termination, demotion, refusal to hire, loss of wages or denial of a promotion?)
4. **Is there a causal connection between the employee's**

protected action and the adverse employment action? (e.g. Does the evidence tend to show that the adverse employment action was, more or less, a direct result of the employee's protected activity?)

A clear answer to each of the foregoing questions can be blurred by the circumstances in any given case. Here are a few brief examples of why there may not be a simple answer:

***Question # 1: Was the employer* covered**? The obvious answer would be that **only an applicant or current employee would qualify for protection under Title VII**. However, in the case of *Robinson v. Shell Oil,* the U. S. Supreme Court held otherwise. In that case, *Robinson*, a former employee who had been discharged by *Shell Oil Co.*, filed a charge with the EEOC alleging that he had been discharged because of his race. He, apparently, applied for a job with another employer and in response to the prospective employer's inquiry *Shell Oil Co.* gave a negative reference about Robinson because of Robinson's charge with the EEOC. The Supreme Court held that in filing his charge *Robinson* had engaged in protected activity, and that this protection "encompassed individuals other than current employees." Thus, former employees, such as Robinson, may qualify under Title VII, as being covered by the anti-retaliation provisions of the act.

Question # 2: What is protected Activity? In general, under Title VII, employees and/or witnesses are engaged in protected activity if they "oppose" an unlawful practice or "participate" in the filing of a charge, testify as a witness, or assist in an investigation or hearing of a charge under the Act.

An employer in Georgia faced the question of whether an employee's false statements during the course of an internal sexual harassment investigation before an actual charge had been filed with the EEOC constituted "protected activity." The employee was fired for making the false statements during the preliminary investigation and later filed a charge with the EEOC alleging retaliation for her participation in the investigation. In the case of *EEOC v Total Systems Services, Inc,* (11th Cir. 2000) the Court held that her false testimony before a charge had been filed was not protected activity and upheld the termination by her employer. This case gives the strong message that protected activity under Title VII with respect to the "participation clause" only commences after a charge has been filed.

Question # 3: What is an adverse employment action? Obviously, a discharge, demotion, reduction in pay, or denial of a promotion can be easily identified as adverse employment actions. However, there are some subtle actions such as a reduction of privileges or benefits as happened in the case of *National Railroad Passenger Corporation v. Morgan,* 536 U.S. 101 (2002) which also may constitute an adverse employment action. While the term "adverse employment action" may sometimes be hard to define in any given case, most courts agree that it must involve a "significant change in employment status" which is detrimental to the employee. For example, a temporary change of shifts with no loss of benefits may or may not constitute an adverse employment action depending upon the circumstances. That is why it is so important to get all of the facts when responding to a retaliation claim.

Question # 4: What constitutes a Causal Connection? The matter of causation is one of the most basic elements that must be proven in a retaliation case under virtually all of the retaliation statutes, whether state or federal. Under Title VII, a plaintiff must prove that there is a "causal connection" between the protected activity and the adverse employment action that followed. In many cases this can be proven just by time, that is, the closeness in proximity

between the protected activity and the adverse employment action (e.g. *Tinsley v. First Union National Bank,* 4th Cir. 1998). In other cases, Plaintiffs may attempt to prove it by a preponderance of the evidence. For example, in the case of *Simmons v. Camden County Board of Education* (11th Cir. 1985) the Court held that the Plaintiff merely had to establish that the protected activity and the adverse action "**were not wholly unrelated**." Obviously, in the 11th Circuit, employers must be extra careful to avoid taking any action after a charge has been filed which could be construed to be an "adverse employment action."

The foregoing provides only a narrow outline of the many related issues that arise in the context of analyzing and resolving a retaliation charge. In the next issue of the *Employment Law Bulletin* we will discuss in more detail certain case law developments with respect to the issues of **coverage** and **protected activity**. As to each we will offer some suggestions on how to craft a response to a charge of retaliation, and also offer some practical measures to take in order to overcome a retaliation charge, or preempt the filing of such a charge altogether.

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.

Section 5(a)(1) of the Occupational Safety and Health imposes the general duty upon employers to keep their workplaces free of recognized hazards that are causing or likely to cause death or serious physical harm to their employees. This provision allows the agency to address hazards that are not covered by specifically adopted work rules.

Each year Section 5(a)(1)/general duty clause violations rank among the most frequently cited. In fiscal year 2004, nearly 1500 such violations were alleged in federal OSHA states.

Issues such as ergonomic and workplace violence, where no OSHA standards exist, have been addressed by use of the general duty provision. Other examples include a variety of things such as, not providing safeguarding at an on-site railroad crossing, not taking measures to protect employees against heat stroke, permitting compressed gas cylinders and vehicle gas tanks to enter a shredder creating an explosion hazard, and allowing a cage cleaning procedure that required the employee to enter the main cage that held two tigers.

OSHA cannot indiscriminately apply Section 5(a)(1) to any observed hazard for which no specific standard applies. OSHA's Field Inspection Reference Manual spells out four required elements to charge such a violation. These are as follows:

(1) The employer must have failed to keep the workplace free of a hazard to which his <u>own</u> employees were exposed.

(2) The hazard was recognized by the employer through first-hand knowledge or common knowledge in his industry.

(3) The hazard was causing or likely to cause death or serious physical harm.

(4) Finally, it must be shown that the hazard can be eliminated or materially reduced by a feasible action or method.

Sometimes when OSHA is not sure whether a specific standard applies to a situation, they may allege a violation of that standard along with Section 5(a)(1) in the alternative. However, they will not normally be able to use 5(a)(1) to

impose a more stringent requirement than that of a clearly applicable standard.

OSHA frequently will issue a Section 5(a)(1) warning letter. In these cases the above four elements necessary for a 5(a)(1) violation may not be fully established. This warning letter carries no penalty and requires no corrective action. But it puts the employer on notice and a future finding on the issue may result in a proposed citation with penalty.

An employer should be aware that in addition to all specific standards, there is the potential for being cited under the general duty clause of the OSH Act. Being diligent in promptly addressing safety and health matters at the workplace can greatly reduce the likelihood of such citations. Always heed manufacturer safety instructions and when recurring accidents indicate a problem, investigate and take corrective action.

DENIAL OF EXTENDED PREGNANCY LEAVE CONSISTENT WITH GENDER NEUTRAL POLICY

The case of *Gerety v. Atlantic City Hilton Casino Resort* (N.J.S Ct, July 26, 2005) involved an employer that refused to extend a leave of absence for pregnancy related matters, because the employee ran out of time under the employer's leave policy. The employee had a complicated pregnancy, which necessitated a 12 week FMLA protected absence. At the conclusion of that leave, she took an additional 14 weeks under the company's medical leave policy. At the end of the combined total 26 weeks, she was unable to return to work and was terminated. She alleged that the employer discriminated against her based upon her pregnancy by not extending her leave further.

According to the court, the employer's policy was "gender-neutral: both male and female employees benefited from the generous leave that Hilton permitted for its eligible employees who experience a serious a medical condition". **The court rejected the argument that the leave policy had a disparate impact based upon pregnancy, arguing that to validate such a claim "would constitute legislating a new minimum medical leave requirement".** The trial court found the company's policy to be discriminatory; the Supreme Court reversed that decision by a vote of 4 to 3.

The evidence showed that there were no exceptions to Hilton's policy, unless a reasonable accommodation issue arose under the ADA. Other than the ADA reasonable accommodation analysis, if an employer is consistent in the application of its leave policy, then an employee with a non-disability medical condition does not have a basis to claim discrimination.

REQUEST FOR AGE INFORMATION RAISES AN AGE OLD QUESTION

Some employers mistakenly believe that it is a violation of the Age Discrimination in Employment Act to ask an applicant his or her age or other information that may identify age, such as the date the applicant graduated from high school. **According to the EEOC, "a request on the part of the employer for information such as 'date of birth' or 'state age' on the employment application is not, in itself a violation of the ADEA".** However, such a request for information "will be closely scrutinized to assure that the request is for a permissible purpose and not for purposes proscribed by the Act".

The case of *Smiarowski v. Phillip Morris USA, Inc.* (S.D.NY, July 5, 2005) involved a similar issue when the employer on its application asked the applicant for "the year you started working professionally". Smiarowski alleged that that was an indirect way to determine her age and it was used as a basis not to hire her

because of her age. Granting summary judgment for the employer, the court stated that "Without more, it is immaterial to the issue of whether any aspect of the defendant's conduct supports an inference of age discrimination. There is no evidence that would permit a jury to infer that the challenged inquiry had an impermissible purpose". The company argued that the question was used for the company's online employment application. Using this the employer can change the software, ruled the court, there's no evidence to infer that the questions was used for an impermissible purpose.

We're not suggesting that employers should ask for an applicant's age. Employers should not ask questions which first, are not job related and second, if the applicant is not hired he or she may think that the reason is based upon how the question was answered. Questions that are permissible are not necessarily advisable to include on the application or during an interview.

DID YOU KNOW . . .

…that it is a violation of the Nationally Labor Relations Act for an employer to use hidden surveillance cameras without first bargaining with the union? *Teamsters v. NLRB* (DC.Cir.July 5, 2005)? The Court upheld an NLRB ruling concerning Anheuser-Busch, when the union requested information about the company's video taping of employees in company break areas and in walkways leading to those break areas. Video tapes showed 16 employees who were smoking marijuana, urinating on company property and remaining on breaks longer than allowed. Interestingly, the Court upheld the board's decision sustaining the disciplinary actions against the employees who were video taped engaging in inappropriate or illegal behavior.

…that an employee may not waive uncontested rights under the Family Medical Leave Act, just as an employee may not do under the Fair Labor Standards Act? This is the decision of the Fourth Circuit Court of Appeals on July 20, 2005 in the case of *Taylor v. Progress Energy, Inc.* Taylor signed a comprehensive release that included any and all Federal claims, but did not specifically name the Family Medical Leave Act. The Court rejected the assertion that the FMLA should be treated as Title VII, the ADEA and the ADA where such releases are permitted. Instead, the court noted that the FMLA statutory model is the Fair Labor Standards Act, where an employee may not waive a claim regarding a violation unless that claim is in dispute at the time the release is executed.

…that the EEOC on July 8, 2005 approved its first major structural re-organization in 26 years? The effects of the re-organization will begin on October 1, 2005, which is the first day of the EEOC's new fiscal year. According to the EEOC chair Cari Domingeuz, "The Commission's structure is an outdated liability". The EEOC plans to downsize eight district offices and reduce the number of management employees in those offices. They also plan to add two offices, one in Mobile, Alabama and the other in Los Vegas. The EEOC's plan calls for an increased focus in southern states. According to Domingeuz, the EEOC's initiative regarding race discrimination "..desperately needs help. In the last two years, race discrimination cases from Mississippi, Georgia, and Alabama have been close to non-existent or have been cases with minimal impact beyond the individual victim and employer".

…that an employer's restrictions on employees discussing company information was overly broad and violated the National Labor Relations Act? *Double Eagle Hotel and Casino v. NLRB* (10th Cir., July 13, 2005)? Employees were prohibited from discussing the company's tip sharing policy. Two employees

were suspended and one terminated for talking about the company's policy on the casino floor. The company stated it was a customer service rule that employees may "never discuss company issues, other employees, and personal problems to or around our guests". The board and 9th Circuit Court of Appeals concluded that the company's rule was overly broad. As an example, the Court stated that "the presence of single guest can transform an area in which employees have a right to discuss work conditions, such as the parking lot or break-room, into a place where discussion is prohibited". Rules that prohibit employees from discussing their pay may violate the National Labor Relations Act. The question is whether the pay discussion is in the context of protected, concerted activity, such as the employee talking about his or her pay in the context of an employer's pay policies or decisions which affect other employees.

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