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August 2005
Volume 13, Issue 8

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

Employment Law Bulletin

To Our Clients And Friends:

An essential component to protect an employer's competitive position is a non-compete agreement that can serve as the basis for a potential claim against a current or former employee whose actions impair an employer's business interests. Two recent cases illustrate the use of this employer right.

In *Design Strategies, Inc. v. Davis* (S.D. NY, August 11, 2005), the company sued a former employee who diverted a business opportunity to a competitor and then quit to become employed by that competitor. The employer did not have a non-competition agreement signed by the employee. The employer sued the employee, alleging that the employee's actions breached that employee's fiduciary duty to his employer.

According to the court, **an employee has a duty of loyalty to his or her employer, regardless of whether the employee had signed a non-compete agreement and regardless of whether the employee is terminable at will. The employee also must act in good faith on behalf of the employer.** The court concluded, however, that the former employer was not capable of performing the work that was diverted to the competitor. Instead of awarding the former employer the value of that contract ($10 million), the court ordered the former employee to pay one month's salary (approximately $6,000) for the period during which the employee had diverted the opportunity to a competitor while on the employer's payroll.

The case of *Oxford Healthcare v. Copeland* (MO. Ct. App., July 27, 2005) illustrates the importance of employers evaluating the validity of a non-compete agreement according to the laws of the state(s) where the employee works. Two employees of a health care entiry signed non-compete agreements; one employee was a former regional director and the other was a nursing supervisor. The non-compete agreement barred them from working with a competitor within 100 miles of the company's main office and also barred them from soliciting patients. The court held that, to be enforceable, a non-compete agreement: (1) must be reasonable in geographical scope and

(2) must protect an employer's trade secrets and/or customer contacts. The court concluded that the Medicaid patients served by this employer were not considered trade secrets or "customers" for non-competition purposes.

Employers would not permit employees to leave the premises with product, designs, and documents outlining strategic plans, why should employers not limit an employee's ability to become a competitor or work for a competitor? Remember that the validity of such agreements is determined by state law, so those employers with employees in multiple states need to assess compliance with each state's laws. The factors courts consider for enforceability include the geographical scope of the restriction, the duration of the agreement and whether the agreement is so restrictive that it effectively eliminates the employee from earning a living in the industry.

SAME ACTOR INFERENCE REVERSES TWO MILLION DOLLAR JURY AWARD

The case of *Griffin v. Schnitzer Steel Industry,* (WA. Ct. App., July 19, 2005) is instructive regarding how the "same actor" inference can help an employer avoid or successfully defend a discrimination claim. The jury awarded Dennis Griffin over two million dollars after it determined that he was terminated due to his age and religion. The managers who terminated Griffin had given him excellent performance reviews, a substantial promotion and an even more substantial raise. In reversing the jury's award, the Washington Court of Appeals stated that "if the employer is opposed to employing persons with a certain attribute, why would the employer have promoted such a person in the first place?"

The employer purchased the facility in 1995, when Griffin was the operations manager and 52 years old. Griffin asked if he could arrive to work late on those days that he taught a religion class, and the employer agreed. Shortly after granting this request, the employer promoted Griffin to general manager and he received a substantial pay raise. During subsequent years, the facility did well and so did Griffin. However, beginning in 1999, there were problems with Griffin's performance, including comments from a large customer about the manner in which the facility was run. The facility lost a substantial amount of money, even after millions were invested to streamline operations. A younger manager of a different religion was brought in from another location to facilitate a turnaround of the situation. He determined that Griffin's "micro management" style was a key factor to the operations problems under Griffin's leadership. Griffin was offered continued employment as assistant general manager, which he declined, and then claimed that he was terminated because of his religion and age.

The employer was able to demonstrate the business reasons for the demotion – Griffin's management style, the losses the company incurred and Griffin's lack of knowledge of risk management issues that were essential to safe operations. Furthermore, the court stated: **"when an employee is both promoted and fired by the same decision-maker within a relatively short period of time, there is a strong inference that he or she was not fired due to any attribute the decision-makers were aware of at the time of the promotion."** If an individual who was involved in the hiring or promotion of an employee participates in the decision to terminate that employee, that person's involvement may assist in avoiding a claim and facilitating a smoother separation from employment. Even if the "same actor" does not participate in both decisions, involving an individual in the termination decision who belongs to the same protected class(es), as the terminated employee can help avoid or successfully defend a claim.

AFL-CIO v. CHANGE TO WIN COALITION

As of 2001, the AFL-CIO membership reached a recent peak totaling 13,164,000 members. The

defection of the Service Employees International Union, Teamsters and United Food and Commercial Workers from the AFL-CIO has reduced that organization's membership from 12,975,000 in 2004 to approximately 9.5 million. Furthermore, due to defections and mergers, the total number of unions belonging to the AFL-CIO declined from 66 in 2001 to 53 today.

In an effort to retain members from the Change To Win Coalition defectors (SEIU, Teamsters and UFCW), AFL-CIO president, John Sweeney recently proposed allowing locals of the disaffected unions to continue to remain members of the AFL-CIO. Sweeney's plan is to create "solidarity charters" for these locals. Those locals would pay to participate in the AFL-CIO. Change To Win Coalition leadership responded by encouraging their locals to reject Sweeney's overtures.

The Change To Win Coalition's first annual convention is scheduled for next month in Cincinnati, headquarters of Cintas, Corporation, which is the target of a national organizing campaign by UNITE HERE, a member of both the Change to Win Coalition and AFL-CIO. We expect overall organizing nationally to pick up at a rapid pace, as both the Change To Win Coalition and AFL-CIO attempt to validate their effectiveness to their members.

REQUEST FOR "HOT STUFF" LEADS TO HOT WATER

Expanding theories of workplace harassment now include a retaliation claim brought by an employee whose store manager requested that she terminate a female sales associate and replace her with "somebody hot". *Yanowatz v. L'Oreal USA, Inc.* (CA, August 11, 2005). The claim was filed under the California Fair Employment and Housing Act, a state law providing discrimination protection similar to Title VII.

In permitting the case to proceed to a jury trial, the California Supreme Court stated that "an employee's refusal to follow a supervisor's order that she reasonably believes to be discriminatory constitutes protected activity…and an employer may not retaliate against an employer on the basis of such conduct when the employer, in light of all the circumstances, knows that the employee believes the order to be discriminatory, even when the employee does not explicitly state to her supervisor or employer that she believes the order to be discriminatory" (that awkward sentence is the Court's not ours).

Yanowatz, a store manager, alleged that the general manager of her division told her that a sales associate was not attractive enough for the store and she should terminate that employee and replace her with "somebody hot". Yanowatz ignored the regional manager's request, asking him for specifics why the sales associate should be terminated. She alleged that in retaliation, she received a poor performance review, was humiliated in front of her subordinates and was denied support needed to adequately run her store. The Court stated that although there was not one specific retaliatory act, "there is no requirement that an employer's retaliatory acts constitute one swift blow, rather than a series of subtle, yet damaging injuries. Enforcing a requirement that each act separately constitutes an adverse employment action would subvert the purpose and intent of the statute". Even though Yanowatz did not speak up in opposition to the regional manager's request, the Court ruled that her refusal to comply with his order because she thought it was discriminatory was sufficient. Thus, at least in California, **an individual "whistle blower" can be protected from retaliation when not blowing the whistle, but just thinking about it.**

The key "lesson learned" for employers is to be able to substantiate the business reason for any adverse action taken toward an employee. If an

individual raises a claim of retaliation (even if the employer did not know about the protected activity), the employer must be able to substantiate the propriety of the decisions affecting that individual. Managers and supervisors should also know that one way to "get behind" is to try to "get even".

CURRENT WAGE AND 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.

Even though the Department of Labor has still not released the promised new FMLA regulations there continues to be much litigation regarding the application of the statute. Two recent decisions could cause problems for employers.

The Fourth U. S. Circuit Court of Appeals recently ruled on an issue relating to the ability of an employer to require an employee to waive their FMLA rights in a severance agreement. An employee of a North Carolina utility had been off work several times due to serious health problems and had been granted FMLA leave on at least one occasion. However, she had been told she did not qualify for FMLA leave on other occasions because she was not off at least 5 days. The utility was undergoing a reduction in force and the plaintiff was selected for the layoff based on her attendance record. Upon termination she was offered $12,000 in severance pay if she would sign an agreement which, among other requirements, stated that she could not bring an action under "any other federal law." The employee signed the agreement to obtain the severance benefit and then filed suit under the FMLA anyway. The firm moved for summary judgment based on the waiver that she had signed and the trial court granted the request. The employee appealed the finding and the Court of Appeals reversed, based on section 825.220(d) of the regulations, which states that an employee may not waive their rights under the FMLA. The regulation states that such an agreement can be made only if the Department of Labor or a court approves the settlement.

In another FMLA case the Seventh U. S. Circuit Court of Appeals issued an opinion regarding the medical certification that an employer may require when an employee returns from FMLA leave. The employer had a Collective Bargaining Agreement (CBA), which imposed greater requirement that those permitted by the FMLA. The Court held that the CBA requirements could not be used since they were more stringent than those permitted by the FMLA. The Court stated that *after* the employee has been reinstated, if the employer has doubts about the ability of the employee to perform his duties, the employer can address the issue as provided by the CBA.

In a separate FMLA case, the Ninth Circuit Court of Appeals ruled for a Seattle area employer. The employee's wife was having a complicated pregnancy and a company supervisor suggested the employee apply for FMLA leave to care for his wife. While supposedly caring for his wife the employee took an airplane flight to Atlanta and spent four days driving a vehicle back to Seattle. While he was gone his wife gave birth to a baby girl. The Court held that the employee could not be "caring for" his wife while driving across the country. Therefore, the employer did not violate the FMLA by terminating the employee for excessive absenteeism. In any event, it is always advisable to have competent legal counsel review any severance agreement and assist you with complex FMLA issues.

There are also new developments in the FLSA area and some of those decisions are summarized below. In a strange twist, employees of a union, UNITE HERE, have filed a FLSA action alleging they have not been paid overtime by the union even though they have been required to work 12-16 hours per day. UNITE HERE is one of the unions that is allied with the group that is separating from the AFL-CIO. We will continue to monitor the information available about this matter.

In response to a Wage and Hour investigation, Humana, Inc., a health-services company in Louisville, Kentucky, has agreed to pay back wages in excess of $1 million to employees at its call centers in Louisville, Cincinnati and Green Bay, Wisconsin. The employees, who will receive an average of $400 each, were not paid for time spent in powering up their computers, logging on to the network and bringing up programs necessary to do their work.

ShopRite Stores, a New Jersey grocery chain, has agreed to pay a penalty of $322,000 for violations of the child labor laws. In a surprise inspection Wage and Hour found 129 minors were allowed to operate paper balers contrary to the FLSA and 82 minors under the age of 16 were found to have worked hours in excess of those permitted. Employers need to remember they should be diligent to ensure they comply with the child labor provisions of the FLSA as the statute provides that DOL may assess penalties of up to $11,000 per violation. On July 29 the Department of Labor sent proposed legislation to the Senate that would provide an increase in civil money penalties for violations of the child labor requirements of the FLSA. Under the proposal, a penalty of up to $100,000 would apply for a repeat or willful violation that causes the serious injury or death of a minor that is working in violation of the statute.

A Wilmington, N.C. hospital recently paid $1.3 million in back wages as a result of a Wage and Hour investigation. The hospital had failed to pay employees for time worked before and after scheduled hours and for meal breaks that lasted less than 30 minutes. This result underscores the need for employers to maintain an accurate record of hours worked by the nonexempt employees. As previously pointed out, one area where employers are particularly vulnerable is where employees are allowed to eat at their workstation. If the employee is at their workstation during their meal break there is always the temptation to perform some work while eating and thus making the time compensable.

Merrill Lynch has agreed to pay $37 million to resolve a private suit brought by California stockbrokers. The firm contended that these brokers were exempt from both the state and federal statutes under the administrative exemption. The plaintiffs contended that they were inside salesmen and were not entitled to the exemption. Approximately 3250 brokers will share in the settlement.

A Birmingham based cable company has paid $182,000 in overtime back wages to more than 200 employees. The employees were cable installers who were paid on a piece rates basis and/or commissions. The settlement with Wage and Hour included employees in Georgia, Maryland, Virginia, the District of Columbia as well as Alabama.

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

EEO TIP:
MORE ON RETALIATION COVERAGE AND PROTECTED ACTIVITY ISSUES

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.

According to EEOC statistics, retaliation is alleged in more than a third of the cases it litigates. This fact, most likely, is not unintended since the EEOC has made retaliation a priority issue in its National Enforcement Plan, which was first implemented in 1999. In the eyes of the EEOC, retaliation against applicants or employees who avail themselves of the rights granted under any of the statutes which it enforces, directly undermines its own basic enforcement authority.

Generally, in order to make out a prima facie case of retaliation under Title VII, a plaintiff must prove: (1) that he or she engaged in protected activity: (2) that he or she suffered some adverse employment-related action or consequences, and (3) that there was a causal connection between the protected activity and the adverse employment actions by the employer. (Incidentally, although our discussion will center mainly on Title VII, the elements of proof are basically the same for most of the other statutes which prohibit retaliation.) The foregoing order of proof suggests the following immediate questions, namely: (1) Who is covered and what constitutes protected activity? (2) What is an adverse employment action? And (3) What type of evidence is necessary to prove a causal connection? Since there is no simple answer for all circumstances, the following are some general concepts used by the courts to address these questions.

As to Coverage All of the federal statutes which prohibit retaliation define, at least in general terms, who is covered by the act. **In virtually all of the statutes, but particularly under Title VII, applicants and employees are covered by the act's anti-retaliation provisions. However, the Supreme Court has held that Congress did not limit Title VII to "current employees" and that other references to "employees" in Title VII encompassed individuals other than "current employees."** Thus, under certain circumstances former employees may be covered. Since that time most courts have limited the holding in this case to situations where a "former employee" is seeking a reference to a prospective new employer, but that may not be the limit.

According to the EEOC, which tends to take a broader view of the law, the persons protected are not limited only to those who actually protest discrimination against themselves but, as examples, also to the following "other persons":

- Men who protest discrimination against women;
- Whites who protest discrimination against blacks;
- Christians who protest the religious harassment of Jews;
- Employees whose spouses, family members, friends or co-workers protest discrimination (e.g., where a father is retaliated against because his son filed a charge against the employer.)

Thus, as a general rule the courts have recognized that current applicants, employees and some former employees are covered by the anti-retaliation provisions of Title VII. Additionally, at least the EEOC considers that other persons (apparently if they are also current employees) are covered if they protest discrimination on behalf of other current employees or are retaliated against because of the protests of relatives, friends or co-workers.

As to Protected Activity The statutory retaliation provisions of Title VII are set forth in Section 704(a) of Title VII [42 U.S.C. 2000e-3(a)]. In pertinent part that section states follows:

> *…It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, … because he has opposed any practice made an unlawful practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.* (underlining added)

The words underlined in the foregoing section are collectively referred to as protected activity. However, the issue of what actually constitutes "protected activity" under Title VII is vast, wide and deep. There is no compact list of actions by an employee or applicant that would encapsulate the limits of protected activity. However, there are some general guidelines, established by case, law which can be used to measure whether the activity in question is within or outside the limits of the statute.

First of all, not just any action by an employee is protected, the acts complained of must be "unlawful," or at least reasonably perceived to be so, under Title VII. Second, the actions by an employee must fall within either the "opposition" or "participation" clauses of the statute.

Protected activity under the Participation Clause includes:

- Filing a charge, assisting in the filing of a charge;
- Testifying in connection with a charge; or
- Participating in any manner in the investigation of a charge or any proceeding or hearing under Title VII.

However, courts have limited the protections of the participation clause to only those activities which occur after a formal charge has been filed with the EEOC. For example, in one case a female who provided false testimony during the course of an in-house investigation of a complaint of sexual harassment was discharged for having done so. According to the 11th Circuit, her discharge was not actionable as participation even though her testimony was about an act made unlawful by Title VII because no charge had been filed at the time of her false testimony. On the other hand most courts have found that the merits of the underlying charge or complaint do not destroy the protections afforded by the participation clause. For example, some courts have found that even if the employee filed a false, malicious charge of employment discrimination with the EEOC, he was still entitled to the protections of the "participation clause." Finally, on this point, the protections under the participation clause extend to close relatives of persons who have filed a charge against a given employer. For example, a husband who supports his wife's charge of sexual harassment, normally, is protected under the participation clause.

Protected Activity under the Opposition Clause includes:

- Complaints about perceived discriminatory actions taken against the employee in question;
- Expressions of concern about discriminatory treatment or policies and practices;
- Complaints about perceived discriminatory treatment of a co-worker;
- Complaints filed through the employer's grievance system or handbook procedures; and
- In certain rare circumstances the opposition could be by public

statements concerning the employer's unlawful employment practices.

As under the Participation Clause, it is not necessary that the practice complained is ultimately found to be unlawful, or that the underlying charge is proven to be meritorious. However, the Charging Party must be able to show that his or her complaints were based on a reasonable belief that the employer's actions were discriminatory and/or unlawful. The reasonableness of the Charging Party's beliefs can be shown by evidence of the employer's perceived practices or actual practices. However, in order to remain within the protections of the Opposition Clause both the belief must be reasonable and the manner of the protest, itself, must be reasonable. Any opposition cannot be disruptive to the normal operations of the business.

The foregoing barely scratches the surface of the myriad examples that could be given to illustrate the reach of protected activity under both the participation and opposition clauses of Title VII. However, it should suffice to show the wide variation of situations that can arise in the context of avoiding retaliation claims under Title VII or for that matter retaliation provisions of the other federal, anti-discrimination statutes. Next month this column will delve into the second aspect of proving a retaliation claim, namely, an analysis of what constitutes an adverse employment action by an employer.

DID YOU KNOW . . .

…that according to the Bureau of National Affairs, first year wage increases for bargaining agreements negotiated in 2005 average 3%, down from 3.3% during 2004? Manufacturing posted an increase of 2.1%, compared to 2.6% in 2004; construction increased by 3.3%, compared to 3.1% in 2004 and non-manufacturing increased by 3.1%, compared to 4% during 2004. State and local public sector employees' pay increased through collective bargaining by 2.9% in 2005, compared to 3.5% in 2004.

…**that the United States Department of Labor, Wage and Hour Division issued opinion letters regarding bonus calculations and time spent seeking medical verification of illness?** The bonus opinion letter concerned bonuses determined by vendors. According to the Department of Labor, those vendor based sales incentives must be included in the employer's calculation of overtime owed to the employee. In the other opinion letter, the Department of Labor stated that requiring that an employee spend time to obtain medical verification of an absence is not considered working time and, therefore, not compensable.

…that Cintas has filed a defamation and trade secrets claim against UNITE HERE, *Cintas Corp v. UNITE* (OH Ct.C.P, August 5, 2005)? The union is trying to organize 17,000 Cintas employees. The union filed unfair labor practice charges with the National Labor Relations Board and issued a press release entitled "Federal Government Charges Cintas With Widespread and Major Violations of Law". The press release was distributed to the company's customers and competitors. The Cintas response is an example how employers can "fight back" when dealing with a union's corporate campaign strategy.

…that on August 19, 2005, the U.S. Department of Transportation issued a new service rule regarding the 11 hour drive time for truckers, which becomes effective on October 1, 2005? The current limit is 10 hours per day of driving after 8 consecutive hours off duty. Under the new rule, truckers may drive for up to 11 hours in a single workday after 10 consecutive hours off duty. The new rule is based upon a driver fatigue study that was conducted by the Virginia Tech Transportation Institute. The new rule retains the current 34

hour continuous rest rule before truckers begin their weekly shifts. The new rules also are less rigid for short haul drivers.

…that employment during July increased in 34 states, according to the Bureau of Labor Statistics? The highest unemployment rates in the U.S. are in Alaska, Illinois, Michigan, Mississippi, New Mexico, Oregon, and South Carolina. The lowest are in Florida, Hawaii, Minnesota, New Hampshire, North Dakota, Virginia and Vermont. The Northeast has the lowest unemployment rate (4.9%); and the Midwest has the highest unemployment rate (5.9%). Florida gained the most jobs in July (42,400); Michigan lost the most (16,600). During the past 12 months, Florida has gained 242,000 new jobs, California 189,000 and Arizona 101,000.

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