"Your Workplace Is Our Work"®

May 2006
Volume 14, Issue 5

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

Employment Law Bulletin

To Our Clients And Friends:

Answer: $6,000,000.00 on May 12 in Fort Lauderdale. Question: What is one of the highest jury awards ever in a worker's compensation retaliation case? *Thigpen v. United Parcel Service*. The award included $669,000.00 for economic damages and $5.3 million in punitive damages. How did this outcome occur?

Thigpen was a twenty-one year UPS employee until his termination in 2001. He filed a worker's compensation claim in 2000, claiming that he injured his ankle. Throughout his twenty-one year history with UPS, Thigpen had a total of seven injuries. Thigpen alleged that a company e-mail directed supervisors to target employees for termination if they had job related injuries. He had previously been terminated and re-hired in July 2001 as a settlement of a grievance. In November 2001, he was terminated for dishonesty about failing to make a delivery; the termination was upheld by the union-management grievance committee. He claimed he handled the delivery in the same manner as other employees who were not terminated. He also claimed that he was singled out for stricter supervision in an effort to "catch him" doing something that would be a basis for terminating him, because he filed worker's compensation claims.

These are some lessons learned for employers as a result of this case:

- If an employee is terminated for a "dramatic incident" (theft, falsification of records, etc.), be sure you can prove it.
- The close proximity of a termination decision to when an employee filed a worker's compensation claim will spotlight the employer's decision.

- "Loose lips sink ships." Managers and supervisors need to be careful when discussing whether they believe an employee is "faking" an injury or comments that the employer needs to "get rid of" an employee because of that injury.

- Be sure that the reasons for the employee's termination are consistent with how others have been treated who engaged in similar behavior and who did not file worker's compensation claims.

A worker's compensation claim does not insulate an employee from the consequences based upon the employee's attitude, attendance, performance or behavior. Because of the support a jury is inclined to give to a terminated injured employee, employers should be sure that the termination decision is not a "close call."

EXECUTIVE TO SEEK EMPLOYMENT ON ANOTHER PLANET

The geographical scope of a non-competition agreement is evaluated by courts based on the responsibilities the individual held and what is necessary to protect the employer's business interest. In the case of *Estee Lauder v. Batra* (S.D. N.Y., May 4, 2006), the court concluded that a global non-competition agreement was enforceable.

Batra was a senior executive for two major Estee Lauder brands. He was responsible for all aspects regarding the advertising, sale and distribution of those brands, worldwide. On March 7, 2006, Batra resigned to work for a competitor, Perricone, and on March 14, 2006, was named president of Perricone. Estee Lauder sued to enforce the non-compete agreement for its duration of twelve months. In granting a preliminary injunction, the court noted that Perricone products completed with the two major Lauder products for which Batra was responsible. The court also noted that Estee Lauder agreed as a condition of enforceability of the non-competition agreement to pay Batra his salary of $375,000.00 for the one year enforcement period of the agreement. According to the court, "although under the agreement, Batra actually is prohibited from working for a competitor anywhere in the world, the concern that the breath of such a prohibition would make it impossible for him to earn a living is assuaged by the fact that he will continue to earn his salary from Estee Lauder."

Note that the enforceability of the agreement related to competing products, not to the broad cosmetics industry as a whole. **When employers contemplate requiring non-competition agreements, consider that the agreement should cover what is needed to protect the business, not what an employer may want to discourage or inhibit an employee from becoming a competitor.** In the instant case, an agreement covering the "whole wide world" was geographically permitted, because it was necessary to protect the employer's interest.

EMPLOYER CREATES A PREGNANT PROBLEM

Employers are not required to create special accommodations for pregnant employees, but employers may not treat pregnant employees less favorably than other employees with non-occupational injuries or illnesses. Such is the lesson an employer is learning the hard way in the case of *Stansfield v. O'Reilly Auto, Inc., D/B/A O'Reilly Auto Parts* (S.D. TX, April 19, 2006). The judge concluded that former employee Deanna Stansfield's pregnancy discrimination claim can be decided by a Texas jury.

The case arose over how the company applied its lifting policies to Stansfield and comments Stansfield's supervisor made about her pregnancy. The company encouraged its female employees to ask for help from male employees when lifting heavy objects. There

were also some men and women who were exempt from lifting entirely, although their jobs required it. However, after Stansfield told her supervisor that she was pregnant, he prohibited her from continuing to ask male employees to assist her with lifting. Stansfield also alleges that when she brought her supervisor a doctor's note limiting her lifting to 20 pounds, the supervisor increased her lifting requirement to up to 50 pounds. When she told him that she could not do that, she alleges the supervisor replied by stating "Oh well, I guess you can't come back to work." She took unpaid medical leave and was terminated when that leave expired.

The following are general principles employers should remember regarding pregnancy discrimination issues:

An employer is not require to "reasonably accommodate" an employee due to her pregnancy. However, if an employer accommodates other employees with non-occupational injuries or illnesses, then the employer must do the same for pregnant employees.

An employer may not stereotypically assume that a pregnant employee cannot perform certain job tasks. Again, the key is don't think pregnancy, think non-occupational injury or illness. If an employer is concerned whether an employee's medical condition may limit the employee's ability to perform job functions or create a risk of harm, an employer may require the employee to provide substantiation from the employee's health care provider that the employee can perform those job tasks, and if not, any suggested accommodation.

Our observation is that most employers work with employees with non-occupational injuries or illnesses to assign job tasks consistent with their limitations. If the value of those job tasks to the employer is less that the employee's regular pay, the employer often has the right to reduce the employee's pay for the other job.

EEO TIP: WHAT IT MEANS TO "VALUE" DIVERSITY

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 April 26, 2006, the U. S. Equal Employment Opportunity Commission (EEOC) released a new report on "*Diversity In the Finance Industry"* through its Chair, Cari M. Dominquez. According to Dominquez, **the report showed that women, as well as African Americans, Hispanics, Asians and American Indians "are still lagging behind as managers in a large share of finance industry firms."** The study examined the banking, credit, securities and insurance sectors with particular attention to the status of women and members of diverse groups in management positions (The EEOC has released diversity reports on other industries in the past). Thus, the matter of diversity at least to the EEOC is an on-going issue.

In last month's article in the *Employment Law Bulletin* on this subject it was suggested that:

- diversity programs are more necessary than ever before because of actual, demographic changes and the fact of a global economy, and
- the historical concept of business or corporate diversity did not work well because it was based on external pressures (societal, legal or governmental) and misdirected toward short-term goals, but that
- an enlightened concept of diversity should be premised on individual competence in helping to achieve bottom-line profits and/or the ultimate mission of the organization, and that

- the new form of diversity is designed to create an organizational culture that values and respects what each individual can bring to the conference table for the sake of those ultimate organizational goals or objectives.

The National Conference For Community Justice (NCCJ), New England Regional Branch, summarizes the challenges of diversity this way: "**Diversity is a demographic reality. It is not, of itself, an opportunity or a threat. How well we learn to work and live together will determine which opportunities or threats will face us as a society and as organizations**."

No doubt, there are many excellent descriptions or definitions of what it means to value diversity. The following by A. P. Carnavale & S. C. Stone in their publication, *Diversity Beyond the Golden Rule* (1995) is very representative:

> "Valuing diversity is being responsive to a wide range of people unlike oneself, according to any number of distinctions: race, gender, class, native language, national origin, physical ability, age, sexual orientation, religion, professional experience, personal preferences, and work style…Valuing diversity involves going beyond the Golden Rule of treating others as you wish to be treated yourself, but instead involves treating others as they wish to be treated."

Obviously, there are limitations on fully applying this definition in a business context but the underlying concept is useful to illustrate a diverse environment. It is perhaps equally obvious that while not every workable diversity program is the same, those that truly value diversity have the following characteristics:

1. **Top management plays a leading role in making sure that the program is fully implemented**. (Instead of delegating that responsibility to the Human Resources Department, Affirmative Action/ EEO Administrator.)

2. **Diversity is included as a strategic part of the organization's business plan**. (Instead of ignoring it as a factor in business development or bottom-line profits.)

3. **Diversity is linked to managerial performance evaluations, incentives and rewards.** (Instead of no linkage to managerial rewards or performance incentives.)

4. **The company or organization develops specific strategies to foster quality products or efforts through team-building and cooperation between employees at all levels.** (Instead of looking to only individual performances as a measure of achievement.)

5. **The company or organization develops a wide variety of programs that effect its cultural values or norms, especially programs which respect, value understand and appreciate individual differences**. (Instead of targeted programs that have no significant impact on cultural values or which only attempt to make all employees conform to traditional organizational norms.)

6. **The company or organization specifically focuses on and implements programs or activities which are inclusive of all employees regardless of race, ethnicity, gender, age, religion, language skills, personality traits, sexual orientation, or physical limitations**. (Instead of programs which primarily focus on women and/or people of color.)

7. **The company or organization emphasizes strategies to more effectively manage a diverse customer**

base, a more diverse stockholder base, and a more diverse societal base which the company hopes to influence. (Instead of strategies which are primarily aimed at employees, not stockholders or the public at large.)

8. **The company or organization is proactively involved in community and social activities concerning diversity.** (Instead of limited involvement in community matters except to meet governmental requirements.)

In the June issue of the ELB, we'll conclude the series on diversity with a discussion of how to implement a modern diversity program.

OSHA TIP: WORKPLACE EMERGENCIES

This article was prepared by John E. Hall, OSHA Consultant for the law firm of Lehr Middlebrooks & 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.

Katrina and the events of September 11, 2001 remind us only too vividly that disasters can and will happen. While thankfully not on that scale, all workplaces could find themselves the victim of some type of disaster. These may involve the natural variety such as tornadoes, hurricanes, and floods, or events such as fires, explosions, chemical spills, toxic gas releases, and structural failures. Man-made threats created by vandalism, "workplace violence" and terrorist acts must also be anticipated.

No amount of preparation can assure that a disaster won't occur, but a well-conceived and implemented emergency plan may significantly limit the resulting damages. While we may choose to think that catastrophes will happen somewhere else, to someone else, we know they will happen. **Failure to prepare can be costly in terms of lost lives and property. It has been estimated that in the range of 30 to 50 per cent of businesses struck by catastrophes never reopen or fail to survive.** Based upon site location, chemical inventories, process hazards and the like, an employer should engage in some type of risk assessment. What are the potential emergencies here and which of these are the most likely to strike? With these answered, appropriate response actions should be crafted for each event and personnel should be trained accordingly.

OSHA has a number of requirements in its standards that relate to emergency planning and responses. The most broadly applicable of these is found in 29 CFR 1910.38, Emergency Action Plans. It sets out the elements to be included in an emergency plan when one is required by an OSHA standard. A minimal plan must include the following:

1. procedures for reporting a fire or other emergency
2. procedures for emergency evacuation
3. procedures to be followed by employees who remain to operate critical equipment
4. procedures to account for all employees after an evacuation
5. procedures to be followed by employees performing rescue or medical duties
6. provision for an alarm system
7. designation and training of employees to assist in an evacuation
8. name and job title of every employee who may be contacted by employees to get more information about the plan or their duties
9. review of the plan with each employee when the plan is developed or the employee is initially assigned, his responsibilities under the plan change, or when the plan changes

A number of other OSHA standards contain requirements for emergency planning and response. Among them is 29 CFR 1910.120, Hazardous Waste Operations and Emergency Response. Under this standard, the employer is exempt from detailed emergency requirements if he chooses to evacuate employees immediately in an emergency **and** he develops an emergency plan in accord with 1910.38.

OSHA's Confined Space standard, 1910.146, and various substance-specific health standards, such as those for cadmium and methylenedianiline call for rescue and/or emergency plans.

A helpful booklet for sorting out requirements for emergency action plans and responses is OSHA Publication 3122, Principal Emergency Response and Preparedness. Also much information on this topic may be accessed on the agency website at www.osha.gov.

WAGE AND HOUR TIP: OVERTIME PROBLEMS

This article was prepared by Lyndel L. Erwin, Wage and Hour Consultant for the law firm of Lehr Middlebrooks & Vreeland, P.C. Mr. Erwin can be reached at (205) 323- 9272. Prior to working with Lehr Middlebrooks & 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 following are the most frequent problems for employers regarding overtime compliance:

1. **Misclassification of employees as exempt from overtime.** If this occurs, the employer may face up to three years of back pay if those formerly exempt classified employees worked overtime.

2. **Improper deduction for break/meal time.** Breaks to be deducted must be at least 21 minutes and the employee must be free and clear of job duties. If employees take two 15 minute breaks, they cannot be added together and deducted. If an employee's break is interrupted such that the employee performs work, then it is likely that none of the break time is deductible. Note that federal law does not require breaks, but some state laws do.

3. **Employees work 'off the clock.'** This violation may subject the employer to double damages and fines. An example is if a manager or department head is told that his/her labor costs are too high, but he/she either does not know what to do or cannot do anything about it. The manager/head may tell employees to punch out and finish their work, which is illegal.

4. **Mistakes regarding what constitutes 'hours worked.'** For example, training, seminar and orientation time usually count as 'hours worked' for determining whether overtime is owed.

An employer should periodically conduct a wage and hour compliance audit. Are records properly maintained? Are employees properly classified? Is time properly recorded/deducted? The risk with wage and hour violations is that even if the amount seems minimal, such as two hours/week for improperly deducting breaks, multiply by 104 or potentially 156, then double it, and multiply that by the number of employees affected, add interest, attorney fees and possible fines, and it will not take long to be considered 'serious' money.

WHAT ARE "WAL-MART" LAWS ALL ABOUT?

"Fair Share" legislation has been introduced in approximately thirty states throughout the U.S. thus far. **The bill requires covered employers to pay a certain amount toward the health insurance costs of its workforce or to pay the equivalent amount to a state fund that would provide health insurance.** Known as

the "Wal-Mart bill," the first fair share legislation was enacted in Maryland. The Maryland statute covers private sector employers with a minimum of 10,000 employees (only Wal-Mart is covered) and requires employers to contribute 8% of their total payroll costs for that state to either health insurance to the workforce or to pay the equivalent to a state fund.

In our region, Kentucky and Tennessee also have such legislation pending. The Kentucky legislation is in essence the same as the Maryland legislation. Wal-Mart has 32,000 employees in Kentucky and would be the only employer in Kentucky covered by this statute. Some bills in Tennessee would apply to employers of at least 10,000 employees and require contributions ranging from 8% to 10% of gross payroll, while other bills pending would apply to employers with 1,000 or more employees (311 companies would be affected by that).

Health insurance availability and affordability will only increase as a national concern. State fair share legislation is the beginning of requiring employers to provide health insurance or pay an equivalent into a state fund; if employers do not address the issue, look for Congress and/or states to expand the definition of "employer" in Fair Share laws to include those with fewer than 1,000 employees.

MUST AN EMPLOYER ACCOMMODATE AN EMPLOYEE'S REQUEST TO SPEND TIME WITH A DISABLED NON-EMPLOYEE?

This is a question that courts rarely address under the American with Disabilities Act, but it in fact has ADA and FMLA implications. The decision of the court in the case of *Overley v. Covenant Transportation, Inc.* (6th Cir., April 27, 2006) is instructive for employers.

Overley worked as a truck driver who told her employer that she could not drive on a certain day and failed to arrange coverage for those responsibilities. She was terminated and alleged violations of the ADA, FMLA and Title VII.

The ADA prohibits discrimination against an employee "because of the known disability of an individual with whom the [employee] is known to have a relationship or association." **In rejecting Overley's ADA claim, which in essence asked for a reasonable accommodation to be with her disabled child, the court said that "Unlike a claim brought by a disabled [employee], an employer is not required to reasonably accommodate an employee based on her association with a disabled person."** In rejecting the FMLA claim, the court stated that the reasons for Overley's absence did not relate to the "serious health condition" of her child. She was handling her daughter's laundry and meeting with representatives regarding establishing a trust for her daughter's care. According to the court, "Such routine activities do not qualify as physical or psychological care under the FMLA, even under the broadest reading of the statute." Finally, in rejecting her Title VII claim, the court said that she failed to show that she was treated differently from any other similarly situated employee.

DID YOU KNOW…

…that in one of the more outrageous decisions, the reinstatement of a violent employee to a job working with explosives was upheld? *Independent Chemical Corporation v. Teamsters* (U.S. Dist. Ct. E.D, NY, April 21, 2006)? The employee was terminated after several warnings and violent behavior, including punching company property and punching and choking a non-employee on company premises. He was also arrested for shooting his common-law wife in front of her daughter. Incredibly, an arbitration panel ordered the employee's reinstatement. The court said that the arbitration panel "arguably" could have found that the company violated the bargaining agreement and, therefore, there is not a basis for overturning it.

…that unfair labor practice charges were filed throughout the United States for the termination or discipline of employees who participated in the pro-immigration demonstrations on April 10, 2006? Many charges were filed by labor organizations; the Change-to-Win Coalition alone filed charges against twelve Chicago area employers. The unfair labor practice charges allege that it is protected, concerted activity under the National Labor Relations Act for employees to support legislation that would affect their legal status.

…that an arbitration agreement includes a soldier's claim of a USERRA violation? *Garrett v. Circuit City Stores, Inc.* (5th Cir., May 11, 2006) Garrett was hired in 1994 and was a member of the Marine reserves. While employed, he received a copy of the company's arbitration program. Under those terms, Garrett had to "opt out" if he did not want to be covered by the program. He did not opt out. He alleged that he was terminated in March 2003 because of his military obligations in preparation for serving in Iraq. According to the court, "Congress took no specific steps in USERRA, beyond creating and protecting substantive rights, that could preclude arbitration." Accordingly, the agreement to arbitrate is broad enough to include the USERRA claim.

…that the AFL-CIO and Change-to-Win Coalition have agreed to partner for political efforts in 2006? Both organizations on May 9, 2006 announced they will work together on political action for the 2006 elections. According to the AFL-CIO, "The entire labor movement is united by the desire to make working peoples' issues the country's priority this election year, and we are taking all the necessary steps to affectively coordinate our efforts toward this end."

…that a union and employer can agree to tighter FMLA requirements for employees than provided in the regulations? *Harrell v. U.S. Postal Service* (7th Cir., May 4, 2006). Harrell was terminated after he failed to present specific documentation that he was fit to return to work, including the nature and treatment for his illness and any medication he was taking. According to the court, "Because the Department of Labor's regulations reasonably interpret [the statute] to allow a [collective bargaining agreement] to impose stricter return-to-work requirements than otherwise incorporated into the FMLA, we defer to that interpretation."

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