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

Employment Law Bulletin

To Our Clients And Friends:

Harassment or discrimination based upon an association with another is an often overlooked area of employment claims. However, two recent cases illustrate an employer's obligations to prohibit this type of conduct.

On July 6, 2006 in the case of *Smith v. Century Concrete, Inc.* (D.KN), a court ruled that a jury could hear the claim of racial harassment brought by a white employee whose wife is black. The employee worked for the company for less than six months. Once his manager and fellow employees found out that his wife was black, he was subjected to racial slurs and required to perform more arduous job responsibilities than his peers. After he complained to the manager's supervisor, the racial comments stopped, but he was still subjected to abusive language. The court concluded that "A reasonable jury may find that this harassment was objectively severe or pervasive so as to alter the terms and conditions of his employment."

The case of *Kauffman v. Maxim Healthcare Services, Inc.* (ED. NY, July 13, 2006), involved a white male recruiter who was belittled and ultimately terminated for hiring two women and a black male. The employer provides staffing assistance to hospitals and nursing homes. The recruiter's supervisors told him that Maxim was a "white male driven company." After he was rebuked for hiring black and female employees, Kauffman hired another female employee and then was terminated. The company argued that Kauffman failed to report his discrimination concerns to upper management. In denying the employer's motion for summary judgment, the court noted that it is not a legal requirement for an individual to report misconduct.

The Americans with Disabilities Act explicitly provides that an individual may not be discriminated against due to an "association" with another who has a disability. However, the same principle applies to the other equal employment

opportunity statutes and also the principles prohibiting workplace harassment: Action may not be taken against an individual based upon the protected status of a non-employee with whom the employee has a relationship.

DISLOYALTY IS NOT PROTECTED CONDUCT

Section 7 of the National Labor Relations Act protects employees who act in concert regarding wages, hours and conditions of employment. Section 7 often arises in the context of union organizing campaigns, but its protection may extend to the non-union setting when an employee speaks up publicly about workplace concerns. However, "speaking up" is not without its limitations, as indicated in the case of *Endicott Interconnect Techs., Inc. v. NLRB* (D.C. Cir. July 14, 2006).

In response to news of impending layoffs, an employee stated to the local newspaper that the layoffs left "gaping holes" in the company and "voids in a critical knowledge base for the highly technical business." Three weeks later, the same employee posted a message on a website hosted by the local newspaper in which he stated that the company he works for "is being tanked by a group of people that have no good ability to manage it." Following the employee's termination, an Administrative Law Judge ruled that the employer violated the employee's Section 7 rights and ordered reinstatement and back pay. This decision was affirmed by the National Labor Relations Board. In reversing the board decision, **the court stated that the employee's communications "were unquestionably detrimentally disloyal. The damaging effect of the disloyal statements, made by an experienced insider when [Endicott] was struggling to get up and running under new management, is obvious…".** Furthermore, the employee's comments were not related to an ongoing labor dispute.

Employers have the right to act when employees internally or publicly disparage or undermine the employer's reputation. An employee's freedom of speech rights relate to the employee as a citizen, not usually as an employee. Therefore, should an employer be aware of an employee's disparagement of the company or specific individuals, the employer should evaluate whether its interests are adversely affected such that discipline or discharge is appropriate.

"I'M SICK" DOES NOT TRIGGER FMLA PROTECTION

An employee must give an employer notice so that the employer has reason to believe the FMLA is "in the picture." Notifying the employer that the employee is "sick", even if the sickness is due to a serious health condition, is insufficient to result in FMLA coverage, ruled the court in *Phillips v. Quebecor World RAI Inc.* (7th Cir. June 12, 2006).

The employee worked for the employer for approximately three years when she was terminated due to excessive absenteeism. On several occasions she called in sick. In the last instance, she said that she was seeing a physician and she would not be at work for three days. The employer charged that absence as an occurrence under the employer's "no fault" attendance policy, which resulted in her termination. It turned out that the employee's sickness was a brain tumor and she argued that she was entitled to protection under the Family and Medical Leave Act.

In upholding the employer's decision, the court stated that the employee never notified the employer that she was receiving continuing treatment, taking medication or of the nature of her sickness. **The court characterized her statement that she was sick and under a doctor's care as "too vague" to constitute notification to the employer for the employer**

to then make an FMLA assessment. To rule otherwise, stated the court, "would place an unreasonable burden on employers."

Remember: An employer is not required to inquire as to the nature of an employee's sickness. The employee must give the employer enough information for the employer to determine whether it may be covered under FMLA. If the employee states that she is sick or visiting the doctor and provides no additional information to the employer, the employer is not required to ask the nature of the sickness or for a statement from the doctor regarding this sickness. In that situation, the employee has not provided information which on its own leads to an employer's FMLA analysis obligation.

WHERE THERE'S SMOKE, THERE'S POTENTIAL LIABILITY

The U.S. Surgeon General on June 27, 2006 issued an opinion regarding secondhand smoke exposure. According to Surgeon General Richard H. Carmona, scientific evidence unquestionably shows that exposure to secondhand smoke causes premature death to those who do not smoke, it has an immediate adverse effect on the cardiovascular system and causes heart disease and lung cancer. There is no "risk free" level of secondhand smoke and establishing designated smoking areas can not fully protect non-smokers from secondhand smoke.

The Surgeon General advised that the only way to eliminate exposure to secondhand smoke is to ban smoking at all indoors locations and to permit smoking outdoors only in an area where non-smokers do not have access. According to the Surgeon General's report, 1.3 million smokers would quit if all workplaces had no-smoking policies. **With the scientific evidence overwhelmingly supporting a connection between health risks and secondhand smoke, employers who do not eliminate exposure to secondhand smoke create an enhanced risk of claims from non-smokers with exposure to secondhand smoke, even if their complications are not due to secondhand smoke.**

OSHA ACTION ITEMS

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.

For most employers, the calendar with due dates for various OSHA actions is pretty full. If your only entry is February 1 for completing and posting your injury and illness results for the previous year, you may need to look further. **There are numerous requirements in OSHA standards that call for periodic training updates, inspections, certifications, etc. While in no way exhaustive, a look at a number of such requirements follows.**

An employer must inform employees upon initial hire and at least **annually** about the existence and right of access to medical and exposure records. 29CFR 1910.1020(g)(1)

Employees exposed to an 8 hour time-weighted average noise level at or above 85 decibels must have a new audiogram at least **annually**. 1910.95(g)(6)

Where employees have **occupational exposure to blood or potentially infectious material**, the required Exposure Control Program must be reviewed at least **annually**. It should also be documented **annually** that there has been consideration and implementation of effective and available safer needle devices. 1910.1030(c)(1)(iv) Further, employees with this type of potential exposure must receive at least **annual** training under this standard.

The **Permit Required Confined Space standard** requires that the program be reviewed by using canceled entry permits within **one year**

of each entry. It is noted that a single annual review may be performed utilizing all entries made within the 12-month period. 1910.146(d)(14)

Under **OSHA's lockout/tagout standard**, the employer is required to conduct a periodic inspection of the energy control procedure to ensure that the requirements of the standard are being followed. This must be done at least **annually** and the employer must certify its accomplishment as to specific machine or equipment, date, employees involved and the name of the inspector. 1910.147(c)(6)

After the initial fit testing of an **employee's tight-fitting respirator**, there must be another fit test at least **annually**. 1910.134(f)(2) In addition to the initial training required for an employee in the use of a respirator, retraining must also be accomplished at least **annually**. 1910.134(k)(5)

Annual maintenance checks must be made of **portable fire extinguishers and records** documenting these checks must be maintained. 1910.157(e)(3) Also where an employer has provided extinguishers for employee use, he must train employees for such use upon initial employment and at least **annually** thereafter. 1910.157(g)(2)

OSHA standards require inspections of cranes and crane components at established intervals. For instance, crane hooks and hoist chains must be visually inspected daily with **monthly** inspections that include certification records. 1910.179(j)(2) Complete inspections of a crane must be given at "periodic" intervals which the standard defines as between **one to twelve months**. 1910.179(j)(3)

The **powered industrial truck operator standard** requires that an evaluation of each certified operator's performance must be made at least **once every three years**. 1910.178(l)(4)(iii)

Note that many of OSHA's substance-specific health standards contain periodic monitoring requirements. For instance where an employee's last monitoring results for formaldehyde shows exposure at or above the action level, the employer must repeat monitoring at least **once every 6 months**. 1910.1048(c)(3)(ii) If the last monitoring results were above the short term exposure limit, monitoring must be repeated at least **once a year**. 1910.1048(c)(3)(iii)

In addition to the above examples, there are other required actions that may be triggered by a change in work processes or environment. An important example would be the introduction of a new hazardous chemical and the need for requisite training under the Hazard Communication Standard. Another would be a change that would call for a training update in an emergency action plan.

EEO TIP: ARE THERE SOME POSSIBLE LOOP HOLES IN THE SUPREME COURT'S RECENT RULING ON RETALIATION?

This article was prepared by Jerome C. Rose, EEO Consultant for the Law Firm of LEHR MIDDLEBROOKS & 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.

Since last month's ruling by the Supreme Court in the case of *Burlington Northern & Santa Fe Railway Co. vs. White* (June 22, 2006), there have been a host of articles and comments by various legal scholars on the potentially devastating effect that decision may have on employers in trying to determine what now may constitute a "materially adverse action" with respect to retaliation. Prior to the *White* decision most courts held that to make out a prima facie case of retaliation under Title VII and/or the ADA a plaintiff must show :

- That he or she was **covered** by the act in question and engaged in **protected activity**;

- That he or she suffered an **"adverse employment action" which had been defined by various courts as (1) an "ultimate employment decision" including material, adverse actions pertaining to hiring, granting leave, discharging, promotions, compensation, or (2) a significant change in the employment status of the employee in question, or (3) any action which was likely to deter an employee from engaging in protected activity;** and finally
- That there was a **causal connection** between the protected activity and the adverse employment action taken.

While there was never universal agreement among the appellate courts as to how the term "adverse employment action" should be defined in the context of a retaliation case, the foregoing general definitions seemed to be workable for most purposes. However, in *White*, the Supreme Court, according to some, moved the goal post into an even more nebulous area of contention by discarding the ultimate-employment-decision standard and/or the significant-change-in-status standard and basically adopting the standard of "**what might dissuade a "reasonable worker" from making or supporting a charge of discrimination."** The substantive facts in the case can be summarized as follows.

The plaintiff, Sheila White, was hired in 1997 into a "track laborer" position and assigned to be a fork lift operator for Burlington Northern at its facility in Memphis, Tennessee. After being in that position a short time, she complained that both her foreman and other male workers harassed her because of her gender. The foreman was disciplined by the employer for his conduct, but White, nevertheless was transferred out of the fork lift position into a regular track laborer position which was in the same job classification, but much harder, more physical work. White then filed a charge with the EEOC alleging retaliation, and shortly thereafter she was suspended for 37 days without pay allegedly for insubordination involving an unrelated matter. After another investigation under the grievance procedure, she was reinstated and with full back pay. Unfortunately, the 37-day suspension without pay was over the Christmas holiday season and White asserted that it worked a great hardship on her family. Following a jury trial and an appeal to the sixth Circuit Court of Appeals, both of which ruled in her favor, the case was accepted by the Supreme Court to review the issue of how severe any retaliatory action by an employer had to be (whether psychological, monetary or otherwise) in order to violate the law.

The Supreme Court specifically held that any action which would dissuade a "reasonable worker" from making or supporting a charge of discrimination" would constitute a violation. The court, however, emphasized "material adversity" in order to "separate significant from trivial harms," and went on to explain that "An employee's decision to report discriminatory behavior cannot immunize the employee from those petty slights or minor annoyances that often take place at work and that all employees experience."

But Does The Court's Language Leave Some Loopholes?

First of all could a loophole be found in the Court's use of the "reasonable worker" standard, itself? Justice Alito's separate concurring opinion suggests just that. According to Justice Alito .."the majority's conception of a reasonable worker is unclear." He points out that: "Although the majority first states that its test is whether a "reasonable worker" might well be dissuaded, …it later suggests that at least some individual characteristics of the actual retaliation victim must be taken into account, " and that "…the significance of any given act of retaliation will often depend upon the particular circumstances." The illustration used by the majority opinion was that of a worker (a young mother with school age children) as to whom the simple change of a shift or work hours might create enormous problems. Therefore,

according to Alito, the "reasonable worker " standard in effect does not require just an "average reasonable worker", but specifically, one which shares the same "individual characteristics" as the alleged victim of retaliation. In the illustration the individual characteristics involved age, gender and family responsibilities.

Second, the critical language in the Supreme Court's ruling was that the challenged, materially adverse action in question might have "dissuaded a reasonable worker from making or supporting a charge of discrimination." (underlining added) This raises the question as to whether the protections afforded by the "participation clause" of Title VII, 42 U. S. C. A. Section 200e-3(a), (Section 704(a) are no longer limited to those activities which occur after a formal charge has been filed with the EEOC. For example in the case of *EEOC v. Total Services, Inc.,* (11th Cir. 2000) a female employee was discharged for allegedly giving false, misleading testimony during the course of an in-house investigation of a sexual harassment complaint, which was conducted before a charge had been filed with the EEOC. The Eleventh Circuit upheld her discharge on the basis that the employer's actions in conducting a pre-charge, in-house investigation of the complaint, was merely a private business matter and fell outside the protections of Title VII.

The EEOC had contended that even though no charge had been filed, the Charging Party's possibly exaggerated testimony was concerning matters which had been made unlawful under Title VII. The Court made it clear that while the protections of the "opposition" clause applied both before and after a charge was filed, the protections of the "participation" clause could not take affect until after a charge had actually been filed with the EEOC.

EEO TIP: The Supreme Court's decision in the *White* case appears to be silent as to this aspect of retaliation, thus leaving the door open for employers to make "pre-charge," in-house investigations of complaints whenever possible to get the unbiased facts of what actually happened. At the very least it would put an employer in a much better position to take action against any employee witness who deliberately embellishes the truth during the course of a pre-charge investigation.

As always we urge employers to use caution in taking disciplinary actions which at some point might be considered to be retaliatory. We suggest that you consult legal counsel before taking any such measures. Please do not hesitate to call at the number above if you have questions or concerns about potentially retaliatory actions you are contemplating.

CURRENT WAGE AND HOUR HIGHLIGHTS

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.

Compliance with the Fair Labor Standards Act (FLSA) continues to be an issue for many employers, as indicated by the increase in the number of lawsuits. During the 1990s the average number of suits filed each year was between 1000 and 2000 whereas in 2004 (the last year that statistics are available) there were 3617 such suits. With the ability of employees not only to collect unpaid wages for up to three years, and an equal about of liquidated damages plus attorney fees employers can face substantial liability if they fail to comply with the FLSA.

For example, in the past year four large brokerage firms have paid over $270 million to settle overtime suits brought by stockbrokers. The most recent case involved Citigroup's Smith-Barney that agreed to pay

$98 million to 11,000 employees. Although most of these employees earned "big bucks," they were paid on a commission basis and thus did not receive a guaranteed salary as required to be considered exempt employees. Suits are pending against at least eight other brokerage firms.

Not all cases are resolved in the favor of the employee(s). Recently courts have ruled that store managers and assistant managers for Abercrombie and Fitch and retail auto service center managers for Valvoline Oil Company were exempt under the executive exemption. In a separate case the U. S. Sixth Circuit Court of Appeals ruled that a group of salaried employees at Detroit Edison Company were exempt even though their weekly pay was reduced due to errors on their time sheets. The court stated that the pay variations caused by employee's sporadic underreporting of hours did not alter their exempt status.

The Pizza Hut restaurant chain has agreed to pay $12.5 million to settle state and federal claims made by store managers. The managers had alleged that they spent the majority of their time performing non-managerial duties such as cleaning, working the cash register and preparing food. The court had found that one such manager spent 90% of her time performing production related nonexempt tasks.

The Eleventh U. S. Circuit Court of Appeals recently ruled that Hillsborough County, Florida **employees who were required to report to an employer-owned parking location to pick up a vehicle to use in traveling to various worksites must be paid for their driving time.** The court held that the employees must be paid for the time (45 to 90 minutes per day) from the parking facility to the first worksite and from the last worksite to the parking facility. In a similar case the Sixth U.S. Circuit Court of Appeals ruled that an insulation company that required its employees to report to the employer's place of business must pay the employees for time spent at the business and time they spent traveling to and from worksites. Further, the court required the firm to pay $95,000 to 45 employees.

A Florida technical school has been ordered to pay back wages and liquidated damages to an instructor who never reported his overtime. The Court found that the employer knew the employee was working overtime and cannot escape liability by merely establishing a rule against such overtime work.

The Department of Labor continues to investigate firms performing clean-up work related to hurricane Katrina. The three companies involved were found to owe in excess of $180,000 to 164 employees. Some employees were not paid the wage rate(s) required by the Service Contracts Act while others were not paid proper overtime for working more than 40 hours in a workweek.

With the continued emphasis on the application of the Fair Labor Standards Act employers should regularly review their pay practices to ensure he is complying with the act. If I can provide assistance please do not hesitate to call me.

DID YOU KNOW…

…that according to a June 22nd survey, average pay increases this year were 3.5% for non-exempt and exempt employees? This report was issued by the Conference Board, based upon a survey of 441 major companies. According to the survey, "moderate inflation has allowed employers to continue to control payroll costs. This continued control is reflected in the pattern of salary increase for budgets this year compared with last year's projections."

…that approximately 50% of all Fortune 500 companies provide health insurance benefits for domestic partners and 86% prohibit discrimination based upon sexual orientation? The survey was conducted by the

Human Rights Campaign Foundation. Discrimination based upon sexual orientation in the private sector is prohibited in California, Illinois, Maine, Minnesota, New Mexico, Rhode Island, Washington and Washington, DC. Exxon Mobil is the only Top 50 company whose workplace discrimination policies do not include sexual orientation.

…that Maryland's "Wal-Mart" law is pre-empted (and thus illegal) by ERISA? This was the ruling on July 19, 2006 in the case of *Retail Industry Leaders Association v. Fielder* (D. MD). The Maryland law requires private sector employer with at least 10,000 employees to pay 8% of the total payroll cost to employee health benefits or to a state fund to provide employees with healthcare. Wal-Mart is the only employer in Maryland large enough to be covered by this law. The court ruled that Maryland's law "violates ERISA's fundamental purpose of permitting multi-state employers to maintain nationwide health and welfare plans, provide uniform nationwide benefits and permit uniform national administration."

…that more states are raising the minimum wage from the federal level of $5.15 per hour? Most recently, Pennsylvania on July 9, 2006 enacted legislation that raises the minimum wage to $6.25 per hour on January 1, 2007 and $7.15 per hour on July 1, 2007. Those employers with fewer than 10 employees will have an increase in the minimum wage at a slower pace. Other states that also have a minimum wage higher than the federal include Alaska, California, Connecticut, Delaware, Florida, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New York, Oregon, Rhode Island, Vermont, Washington and Wisconsin, and Washington, DC. Note that federal wage and hour laws and regulations are only a minimum requirement. States have the right to prohibit certain pay systems permitted by the Fair Labor Standards Act and to raise the minimum wage above the federal standard.

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