"Your Workplace Is Our Work"®

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Lehr Middlebrooks & Vreeland, P.C.
2021 Third Avenue North
Birmingham, AL 35203
205-326-3002
www.lehrmiddlebrooks.com

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

Employment Law Bulletin

To Our Clients And Friends:

After a three-year drop, the number of employment discriminations filed with the Equal Employment Opportunity Commission rose slightly for Fiscal Year ending 2006 (September 30). A total of 75,800 charges were filed, compared to 75,400 charges during the previous year. In FY 2002, a total of 84,400 charges were filed.

The percent of charges resulting in "cause findings" increased to 22.2% for 2006, compared to 19.5% for 2005. However, the amount of money the EEOC obtained for charging parties decreased to $274 million for 2006, from $378 million in 2005 and $415 million in 2004.

Race claims were the highest in number (27,238), compared to sex discrimination (23,247) and retaliation (22,555). Disability discrimination charges numbered 15,625 and there were a total of 13,569 age discrimination charges. The EEOC filed a total of 371 lawsuits during 2006.

Due to budget restrictions, the EEOC is unable to fill all existing vacancies. Accordingly, employers and charging parties should expect longer delays in Commission efforts to investigate, decide and resolve charges. The EEOC resolved 74,300 charges during 2006, a decline from 77,302 in 2005 and 85,000 in 2004. The average time to process a charge rose to 193 days, compared to 171 days in 2005 and 165 days in 2004. The number of unresolved charges pending at the EEOC is 40,000, compared to 33,500 a year ago.

The fact that the EEOC concludes that more than one out five discrimination charges has merit concerns us. How employers address the following factors in response to a charge

determines whether the EEOC believes discrimination occurred:

- Was the reason for the employer's treatment of the charging party consistent with how others who engaged in similar behavior were treated?
- If the charge arose upon termination and the termination decision was not due to a "dramatic event," did the employer tell the charging party that termination could occur if improvement were not sustained?
- Who were the decision-makers regarding the charging party and were any of those decision-makers involved in the decision to hire the charging party?
- Did the charging party receive the employer's Equal Employment Opportunity policy, which includes a process for employees to report concerns if they believe the policy has been violated?
- Who replaced the charging party?

When receiving a charge of discrimination, be sure the charge is a proper one jurisdictionally. For example, does the individual identify others not in the same protected class as the charging party who received preferred treatment? If the claim is for a disability discrimination, does the individual allege a condition that meets one of the ADA definitions of disability?

EMPLOYER RIGHTS TO PERMIT LAW ENFORCEMENT SEARCH OF AN EMPLOYEE'S COMPUTER

The case of *US v. Siegler* (9th Cir. January 30, 2007) involved the question of whether an employer lawfully permitted a law enforcement agency to search an employee's computer at the workplace. The employer, Frontline, is a Bozeman, Montana company that processes payments online. **The employer communicated to employees its internet and e-mail use policy. In its policy, the employer said that the computer and its use were for company purposes, employee use of the computer and technology would be searched and employees had no reasonable expectation of personal privacy regarding their use of the company's computer.**

Frontline was contacted by the FBI, who reported that one of the company's employees used the internet at the company's office to search for child pornography. The company entered the employee's office at night, made a copy of the hard drive and turned the hard drive and computer over to the FBI.

The Ninth Circuit stated that because the employee kept his office locked, he had a reasonable expectation of privacy that his office would not be searched without a search warrant. However, the court noted that an exception to the search warrant is where employees do not have a reasonable expectation of privacy. In this case, the employees were notified in advance that they could not have reasonably expected that their computer and its contents to be considered their personal property, as the employer retained the right to authorize a search of the employee's office and its contents.

Do not assume that company property means the employer has an inherent right to search it. If an employer wants to protect its interests to conduct a search of an employee's office, computer or vehicle on company property, be sure to do the following:

1. Adopt a computer/technology use policy that tells employees that the employer may search the computer to be sure its use is consistent with company policy and employees have no reasonable expectation of privacy regarding information sent, review or received.
2. For employee offices and the lockers, state that the company reserves the right to conduct a search of that property and contents.

3. If employers desire to search vehicles on company property or employee packages are brought onto or off of company property, communicate that in advance to the workforce.

If an employee refuses to consent a search, state to the employer that he or she may face disciplinary action, including termination, for insubordination.

"WHO'S ON FIRST" COSTS EMPLOYER $178,750

There's an expression along the lines of "success has many parents and failure is an orphan," which describes the circumstances in the case of *Chalfant v. Titan Distribution, Inc.* (8th Cir. January 22, 2007). An applicant was not hired and alleged it was due to his disability. A factor influencing the court in letting the case go to a jury, and in influencing the jury's award of damages, was that "each person [in the hiring process] simply denied that he or she had any involvement at all in the decision not to hire Chalfant. A reasonable jury could infer that this unusual decision-making process occurred because Titan was aware at the time it decided not to hire Chalfant that it may have been acting in violation of federal law."

Titan terminated a relationship with a subcontractor that provided tire mounting and distribution services. Titan chose to "in-source" those functions. Chalfant was a second shift supervisor for the contractor. He and his other colleagues applied for employment performing the same job duties for Titan as they had for their contractor company. Chalfant completed a medical questionnaire, where he stated that he had bypass surgery, carpal tunnel surgery, arthritis and that he was disabled. The company's physician said that he could perform his current job duties (forklift operator) without accommodation. After Titan told Chalfant he was hired, he then was told that he failed the physical and would not be hired.

In addition to the company decision-makers "scattering" when the lights were turned on regarding this decision, the company also gave inconsistent explanations for why Chalfant was not hired. It told EEOC that he was not hired because he failed the physical, yet at trial the company said he was not hired because his shift was going to be cut anyway and he would have been laid-off.

According to the court, the company's actions violated the ADA because the company "regarded" Chalfant as disabled. Supporting the jury's conclusion were the company's inconsistent reasons for why Chalfant was not hired and the use of medical information to disqualify Chalfant for the job when according to the company's doctor, he was able to perform the essential tasks of the job for which he applied.

BIGGEST EMPLOYMENT CLASS ACTION IN HISTORY TO PROCEED AGAINST WAL-MART

On February 6, 2007, the Ninth Circuit Court of Appeals certified a class action involving approximately 1.6 million women employees nationwide. *Dukes v. Wal-Mart, Inc.* According to the court, "plaintiffs' expert opinions, factual evidence, statistical evidence, and anecdotal evidence presents significant proof of a corporate policy of discrimination and support Plaintiffs' contention that female employees nationwide were subjected to a common pattern and practice of discrimination. Evidence of Wal-Mart's subjective decision-making policy raised an inference of discrimination and provides further evidence of a common practice."

The lawsuit alleges that Wal-Mart's subjective assessment for promotions denied women as a class opportunities to move into management positions. Only after the lawsuit was filed did Wal-Mart begin to post management vacancies.

Wal-Mart had argued that its promotion practices are decentralized and handled on a

store by store basis. The court stated that the common thread throughout that practice was the subjectivity used to make promotion decisions, which was a corporate policy, not an individual store policy. The plaintiffs seek back pay, front pay, punitive damages and injunctive relief. In addition to this case becoming the largest employment class action in history, it will likely also become the most expensive employment case ever.

EEO TIPS: OFFICE ROMANCE – HOW TO CONTROL IT AND AVOID PROBLEMS

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 Alabama and Mississippi. Mr. Rose can be reached at (205) 323-9267.

Although Valentines Day was earlier this month, the season for workplace romances has not ended. As a matter of fact, office romances seem to thrive throughout the whole year. **According to the American Management Association, approximately eight million office romances will take place during any given year.** Perhaps one reason they are quite common and tolerated by employers is that they are not necessarily a violation of federal anti-discrimination employment laws. Additionally, according to *Vault.com*, (a website with information on 3000 companies and 70 industries), a significant number of co-workers (40%) say they met their future spouses at work, including Bill Gates and Steve Ballmer of Microsoft and Steve Gates of AOL each of whom reportedly met their mates at work.

According to Larry Ballard, who writes a column for the Des Moines Register, called *Workbytes,* there are a number of good reasons why office romances so readily bloom. He states that (1) "people spend more time at the office (some of it working);" (2) "there are nearly 20 percent more single people in the workplace;" and (3) "most employers have only vague or nonexistent rules on co-worker coupling."

Such fertile ground together with the fact that a truly consensual relationship that is conducted in a professional manner while the parties are in the workplace probably keeps it below the radar screen of managerial scrutiny. The results of an e-mail survey conducted by the *Seattle Post Intelligencer,* and reported last year (in its February 13, 2006) issue showed that:

- **Slightly more then 70 percent (70%) of the employers contacted did not have a specific written policy against "dating on grounds" and saw no pressing need to implement one.** Only nine percent (9%) of the employers surveyed had an outright ban on dating co-workers.
- The survey also found that while most felt that dating a supervisor or boss was a "no-no," fifty-four percent (54%) of the men and forty percent (40%) of the women were open to dating a co-worker.

Specifically, the EEOC in its Policy Guidance on Employer Liability for Sexual Favoritism, Number N-915-048 (January, 1990) states as follows:

> "Not all types of sexual favoritism violate Title VII. It is the Commission's position that Title VII does not prohibit isolated instances of preferential treatment based upon consensual romantic relationships. An isolated instance of favoritism toward a "paramour" (or a spouse, or a friend) may be unfair, but it does not discriminate against women or men in violation of Title VII, since both are disadvantaged for reasons other than their genders."

However, the EEOC also warns in this same Notice that in many instances "sexual favoritism in the workplace which adversely affects the employment opportunities of third parties may take the form of implicit "quid pro quo" harassment and/or a "hostile work environment". For example, when "employment opportunities or benefits are granted because of an individual's submission to the employer's

(Supervisor's) sexual advances or requests for sexual favors, the employer may be held liable for unlawful sex discrimination against other persons who were qualified but were denied that employment opportunity or benefit."

Thus, notwithstanding its popularity and general acceptance, most enlightened employers would find that such liaisons are tantamount to "looking for love in at least one of the wrong places." Recently, a good case in point was *Tate v. Executive Management Services, Inc.,* U.S District Court for N. D. of Indiana, (October 2006) In this case Alshafi Tate, a custodian for Executive Management Services, Inc. (EMS), became involved in a sexual relationship with one of his supervisors, Dawn Burden. The relationship at first was entirely consensual by both parties. However, when Tate decided to end the relationship because of his marriage, Burden became very agitated and told Tate that he had to chose between his job and his wife. He chose his wife, whereupon Burden proceeded to process termination papers accusing Tate of failing to perform the duties of his position. Ultimately, Tate was terminated by EMS. Thereafter he filed suit alleging both sexual harassment and retaliation. The jury found that Tate had failed to prove his claim of sexual harassment, but allowed his claim of retaliation to stand.

EMS contended that the retaliation claim should be rejected also because the employer did not have any knowledge of the supervisor's conduct and also that it had no knowledge of Tate's alleged opposition to any unlawful employment practice. However, the court in rejecting EMS's motion for a directed verdict on the issue of retaliation found that that an employer could be liable if the supervisor had a retaliatory motive in submitting termination papers to her superiors who were the decision makers and the decision makers relied on that information to fire Tate. Also, the court held that under certain circumstances, such as in this case, opposition to behavior that amounts to sexual harassment can constitute "opposition to an unlawful employment practice."

It can be seen from the foregoing case that **when an office romance goes bad, it can create many perils for the company and for the parties themselves.** Here are a few other reasons why employers need to be wary of such relationships:

- It can hamper the productivity of both parties if they allow the relationship to include their work time by taking extended lunches or breaks together;

- It may lower the morale of other employees and create the perception of a conflict of interest or favoritism (whether actual or not), especially where one of the parties is in a position to show partiality (such as a foreman or team leader) which could lead to a charge of discrimination.

- As stated above, often the work environment is negatively affected when one of the parties wants to end the relationship, but unfortunately they work together daily by virtue of their work assignments or job stations. Such creates a real risk of sexual harassment and may damage the morale of co-workers who must work in close proximity to either or both of the disaffected parties.

Accordingly, although it may not be possible to prohibit all workplace romances, it is generally wise to establish some specific rules or guidelines for such relationships, especially as between a supervisor and a subordinate. The following are some suggested minimal rules to address the problem:

1. The parties should receive the employer's harassment policy so they know to report any uncomfortable behavior.

2. The relationship should not be carried on during working hours or hinder productivity (No lingering at your paramour's desk or the water fountain).

3. The relationship should not be discussed at the office or in the workplace. (While other employees may suspect that something is going on between the two persons, that is not necessarily a reason to publish it throughout the office.)

4. That relationships between a supervisor and a subordinate should be discouraged. Adopt a "touch and go" policy for supervisors – if they touch or try to touch, they go.

EEO TIP: The rules established for any given company or firm should be tailored to the size and needs of that firm. No one set of rules will fit all companies. However, employers who have fifteen (15) or more employees are especially vulnerable to the prohibitions against sexual harassment under Title VII and therefore are in need of a more comprehensive set of rules.

Framing a reasonable set of rules for your company without infringing upon the private rights of your employees to associate freely either on or off the job can be a complex matter which requires the help of legal counsel. Please call this office at (205) 323-9267 if you have questions and/or need our legal assistance.

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.

The Family and Medical Leave Act (FMLA) continues to generate much activity involving both the courts and the Department of Labor. The Wage and Hour Division of the Department of Labor requested input from the public concerning possible changes in the regulations. As Wage and Hour has promised to update the regulations numerous times, it will be interesting to see if they actually issue some new regulations. With DOL's previous track record in this area, I doubt that any proposals will be made in the near future.

Meanwhile there continues to much litigation under the FMLA. During December three different U. S. Courts of Appeals rendered decisions in FMLA cases:

1. The First Circuit ruled that an employee who had previously worked for an employer for five years and had a five-year break in service met the requirement for having at least 12 months of employment, even though the employee's current employment period had been only 7 months. In its ruling the court, primarily relying on DOL regulations, declared that "the complete separation of an employee from his or her employer for a period of years … does not prevent the employee from counting earlier periods of employment with the employer towards satisfying FMLA's 12-month requirement."

2. In a case dealing with reinstatement to an equivalent position, the Fourth Circuit ruled that an employer did not violate the FMLA when it restored an employee to another position upon his return to work from qualifying leave even though the duties changed. The court found that the measurable aspects (pay, work schedule, office location, title, benefits and bonus eligibility) never changed, and thus the new job was an equivalent position as required by the FMLA.

3. An employee's medical history was enough to put employer on notice for FMLA leave according to the Seventh Circuit. A long time employee had met with management regarding job performance and during the meeting told them that he believe he had a serious illness and was scheduled to have a

biopsy. The following day he returned to work and provided the employer with a treatment plan instructing the employee to avoid heavy lifting or strenuous activity. Two days later the employee requested vacation until he received the results of the biopsy; however, the employer terminated the employee three days later and eight days before the employee received a diagnosis of cancer. Employers need to remember that it is not necessary for the employee to invoke or request FMLA to be protected by the Act.

4. The First Circuit also found that an employee requesting FMLA leave could not count the employees of the parent company to meet the "50 employee within a 75 mile radius test." The employee worked for S. P. Richards Company, an office supply wholesaler, which was a wholly owned subsidiary of the Genuine Parts Company, an auto parts retailer, that employed more than 50 employees in the same city. Although the Richards employees were allowed to participate in Genuine's fringe benefits plans and were issued their pay checks by Genuine the court held that the two companies do not have common management, interrelated operations, or central control of labor relations. Consequently, the Richards employees were not covered by the FMLA.

The number one issue under the Fair Labor Standards Act is the effort by Congress to increase the minimum wage to $7.25 per hour over the next two years. The House has passed the bill to provide such an increase and the Senate passed a bill in early February. However, both the Senate and House bills contain some different small business tax relief, thus there will need to be a conference committee to resolve the differences between the two bills. In its FY-2008 budget request to Congress the White House has recommended a 10% ($16.7 million) increase in funding for the Wage and Hour Division to allow them to hire additional investigators.

There have also been several Fair Labor Standards Act cases that resulted in large payments by employers.

1. Wells Fargo & Co. has agreed to pay almost $13 million to 3300 employees, business analysts and business consultants that the firm had classified as exempt. The employees were engaged in producing automated versions of paper forms, updating automated forms and providing routine production support. The settlement was reached after four days of mediation by a retired judge.

2. E-Loan Inc., an online mortgage lender, agreed to pay $13.6 million to 500 employees that the firm had erroneously considered as exempt under the administrative exemption. An attorney involved in the case indicated that the average settlement payments would be $20,000 per employee.

3. Wal-Mart has agreed with the Department of Labor to pay more than $33 million in back wages plus interest after an internal audit. The agreement covers more than 86,000 employees and involves how Wal-Mart computed overtime on incentives and other premium pay as well as nonexempt salaried interns, manager trainees and programmer trainees. The settlement does not affect the ongoing private litigation in several locations.

4. ABC Professional Treat Services, Inc. of Houston has agreed to pay $1.8 million in overtime back wages. The firm, which provides clean up services for utility companies after natural disasters, will distribute the wages to 2500 employees in 16 states.

5. A New York restaurant has been ordered to pay $700,000 to 11 employees who were denied tips and minimum wage as the employer kept 25% of the tips received by the employees and paid non-tipped employees out of the tip pool. The FLSA requires that the tipped employee retain all of their tips and they may only be pooled with other employees who customarily receive tips (i.e. busboys, bar tenders and wait staff).

Because of the potential for large liabilities under both the Fair Labor Standards Act and the Family and Medical Leave Act employers must be diligent in their efforts to ensure compliance with both of these statutes. If I can provide assistance to you in this effort you may reach me at 205 323-9272.

OSHA SAFETY TIPS: OSHA STANDARDS ACTIVITY

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.

OSHA announced in a news release on February 13, 2007 that the final rule updating the electrical installation standard is being issued. The 202 page document may be found in the February 14 Federal Register, FR 72:7135-7221.

Changes to OSHA's general industry electrical installation standard focus on safety in the design and installation of electric equipment in the workplace. The updated standard includes a new alternative method for classifying and installing equipment in Class I hazardous locations; new requirements for ground-fault circuit interrupters (GFCIs) and new provisions on wiring for carnivals and similar installations.

The revised rule updates the general industry electrical installation requirements (Sections 1910.302 through 1910.308) to the 2000 edition of the NFPA 70E, which was the foundation of the standard. It applies to employers in general industry and shipyard employment.
This revision is the first update of the installation requirements to the general industry standard since 1981. The latest revision to 70E was in 2004 and some thought OSHA should use that version rather than 2000. OSHA decided against that, in part, because the 2004 version was not part of the rulemaking record and the Agency felt that the public may not have had adequate notice of changes. To rectify that would have been to re-propose the standard and possibly see another revision to 70E before the OSHA standard could be finalized.

Electricity is widely recognized as a serious workplace hazard, exposing employees to electric shock, burns, fire and explosions. Bureau of Labor Statistics data indicate that around 300 workers lose their lives each year by contact with electrical current. BLS also found that between 1992 and 2001, an average of 4,309 employees lost time from work due to electrical injuries.

OSHA inspections frequently disclose electrical hazards and violations of standards. Two standards, one addressing electrical wiring, components and equipment (1910.305) and the other, general use (1910.303), rank in the top 10 most frequently cited OSHA standards. Combined, they are second only to the Hazard Communication Standard (1910.1200) in frequency of citation by OSHA for general industry employers.

Many of the more common electrical violations cited on inspections are rather obvious and don't require any particular expertise to identity. For example, finding a maze of electrical cords draped over parts of the building structure, machines and equipment should suggest a problem. Such temporary wiring cannot be used as a substitute for fixed wiring, or where run through doorways, windows or holes and

the like. Frayed wires, missing grounding pins on attachment plugs and covers missing on electrical cabinets and boxes should also be readily noted and corrected.

This final rule becomes effective on August 13, 2007.

LMV TRAINING SERIES SCHEDULE

March 13, 2007
A Natural Disaster - Will it Devastate Your Business?
Webinar
David Middlebrooks
Although you cannot predict the next Hurricane Katrina or outbreak of bird flu, you **can** minimize its financial, legal and psychological impact on your business and employees. The key is being prepared to implement and maintain a crisis management plan. Learn how to outline your plan and facilitate you company's survival and recovery. **Cost**: $100.00

April 17, 2007
Affirmative Action Basics
Webinar
David Middlebrooks and Donna Brooks
What is required for an affirmative action plan under the most recent OFCCP regulations? What happens during an OFCCP audit? What are OFCCP compliance officers looking for? This two-hour webinar will be geared to those companies and professionals who are just entering the strange world of compliance with Executive Order 11246 as well as those who want to ensure they understand the fundamentals and basic techniques for compliance. Covered topics will include: key regulatory requirements of every affirmative action plan and how to satisfy those requirements, "dos and don'ts" for successful affirmative action plans and policies, and important tips and practices to help your company successfully avoid and/or survive OFCCP audits. **Cost**: $100.00

April 24, 2007 (Holiday Inn Express, Huntsville, AL)
April 25, 2007 (Holiday Inn, Decatur, AL)
May 15, 2007 (Bruno Conference Center, Birmingham, AL)
The Effective Supervisor
LMV Attorneys and Consultants
Over 5,000 business professionals have attended this conference in the past 10 years! For 2006, this popular, one day-program continues to emphasize the fundamentals of successful supervision (by exploring such topics "lawful leadership," performance evaluations, discipline, and discharge), and will include discussions of particular importance to Alabama's business community, including hiring and retention strategies. Click here for agenda and registration info.

May15, 2007
Document Retention: The Electronic Time Bomb
Webinar
Al Vreeland
We all know to retain important paper documents when we expect an EEOC Charge or lawsuit, but what about electronically stored information?. Today, 95% of all data is maintained electronically and half of that is never reduced to paper form. Recent amendments to the rules that govern federal lawsuits impose complex data retention requirements even before a lawsuit is filed. We'll review those requirements and how to prepare for compliance now - before its too late, as well as how to structure your document retention policy so you don't get sanctioned. **Cost**: $100.00

For more information about Lehr Middlebrooks & Vreeland, P.C. events, please visit our website at www.lehrmiddlebrooks.com.

DID YOU KNOW…

…that the Service Employees International Union on January 29 announced that it will form another union for healthcare employees, only? Known as SEIU Healthcare, the union will have approximately one million members who are currently under the SEIU umbrella. The union's goal is to organize the non-union nine million healthcare workers who are not registered nurses. SEIU Healthcare will take a separate approach with nurses, developing alliances with state nursing associations. Dennis Rivera will be president of the union; during the past eighteen years he has been president of SEIU Local 1199, which represents approximately 300,000 healthcare workers.

…that the average first year increase for bargaining agreements in 2006 was 3.6%, including lump sum payments? According to the Bureau of National Affairs, the average three year wage increase in manufacturing for agreements reached in 2006 was 3.4%, in the first year, 2.8% in the second year and 2.8% in the third year. For non-manufacturer employers, the first year average was 3.9%, the second year 3.4% and third year 3.4%. 11% of all contracts contained lump sum payments, a

decline from 14% in 2005 and 17% in 2004. The highest year for lump sum payments was 1988 (36%).

…that the United States Supreme Court will determine whether discrimination liability exists for a "rubber stamp" review of employment decisions? In the case of *BCI Coca Cola Bottling Company of Los Angeles v. EEOC*, the company required all terminations to be reviewed by its corporate manager of human resources. In this case, a manager at a location over 400 miles away from corporate headquarters recommended the termination of a black employee. The corporate manager reviewed the recommendation and approved it. The terminated employee alleged he was terminated based upon his race, but the company argued that the ultimate decision-maker—the corporate manager—did not know the race of the employee. The question the US Supreme Court will decide is whether a subordinate's recommendation that is tainted with bias and in essence is "rubber stamped" by the employer is a discriminatory decision. This case has important implications to employers with internal review processes prior to implementing a termination decision. The lower court had ruled that because the corporate manager relied only on the paperwork submitted by the individual recommending the termination, the review process was really a "rubber stamp" of a discriminatory decision, not an independent review.

…that on January 4, 2007, the House of Representatives renamed the Committee on Education and Workforce to the Committee on Education and Labor? That was its original name when created in 1867. On Thursday, February 18, the committee along party lines reported out the Employee Free Choice Act, which substantially eliminate secret ballet elections for employees to decide whether they wanted union representation.

…that a rapidly growing company's inadequate policies do not justify punitive damages, ruled the court in *Allen v. Tobacco Superstore, Inc.*? (8th Cir. February 2, 2007) The case involved a race discrimination claim where the jury awarded punitive damages in part because the company, with 82 stores, did not have written policies addressing workplace discrimination. In concluding that punitive damages were inappropriate, the court stated that "although TSI's rapid growth and promotion practices failed to justify the racial disparity within TSI's management personnel, those practices demonstrate justifiable business reasons or ineptness and not racial malice or reckless indifference…" None of the company's 82 stores had a black manager and the company did not post vacancies for management positions.

LEHR MIDDLEBROOKS & VREELAND, P.C.

Donna Eich Brooks	205/226-7120
Michael Broom (Of Counsel)	256/355-9151 (Decatur)
Whitney Brown	205/323-9274
Lyndel L. Erwin (Wage and Hour and Government Contracts Consultant)	205/323-9272
John E. Hall (OSHA Consultant)	205/226-7129
Jennifer L. Howard	205/323-8219
Richard I. Lehr	205/323-9260
David J. Middlebrooks	205/323-9262
Jerome C. Rose (EEO Consultant)	205/323-9267
Michael L. Thompson	205/323-9278
Albert L. Vreeland, II	205/323-9266
Sally Broatch Waudby	205/226-7122