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

Employment Law Bulletin

To Our Clients And Friends:

The minimum wage will increase from $5.15 to $7.25 per hour during the next two years, based upon legislation passed overwhelmingly by Congress on May 24, 2007 and signed by President Bush on May 25, 2007. Known as the "Fair Minimum Wage Act of 2007," the Act was part of the 2007 appropriations bill for continued funding of the war in Iraq, Katrina recovery, veterans' care and U.S. troop readiness.

The minimum wage will increase from $5.15 per hour to $5.85 per hour on July 24, 2007; it will increase to $6.55 per hour twelve months thereafter on July 24, 2008; and increase again to $7.25 per hour on July 24, 2009. Currently, only 4% of the U.S. workforce earns less than $7.25 per hour.

This legislation will have a "roll up effect" on other pay systems, such as fixed salary for fluctuating work week. It will also have the effect of spotlighting to employees other pay issues, such as deductions from pay, exempt status and overtime pay. **For a comprehensive review of this legislation and its impact on employers, please join us at our firm's Briefing for Retail, Service and Hospitality Employers, scheduled for June 21, 2007 from 8:30 a.m. until 12:15 p.m.** The program is complementary. Speakers include Lyndel Erwin, who is a consultant with our firm and former District Director for United States Department of Labor, Wage and Hour Division. Lyndel will discuss this legislation, in addition to other wage and hour issues affecting employers in those industries. For a detailed agenda and registration, please contact Maria Derzis at (205) 323-9263 or click here mderzis@lehrmiddlebrooks.com.

U.S. SUPREME COURT ADDRESSES GENDER-BASED PAY CLAIMS

On May 29, 2007, the Supreme Court issued its 5-4 decision on the *Ledbetter v. Goodyear Tire & Rubber Co.* case that had wound its way up from the Northern District of Alabama through the Eleventh Circuit Court of Appeals to the high court. The Plaintiff, Lilly Ledbetter, complained that in many years of working for Goodyear, she had been paid less than her male counterparts, in violation of Title VII. Ledbetter alleged that this disparity began at the hands of a former supervisor who gave her low evaluations because she spurned his sexual invitations. The alleged harassment and poor reviews which laid the foundation for a perpetual pay disparity happened years before she ever filed an E.E.O.C. charge. Based on that foundation, **Ledbetter wanted to receive backpay from the period beginning 180 days before filing her charge up to her retirement on the basis that each pay period "renewed" or kept current the initial discriminatorily-intentioned decisions that led to the disparity. The Supreme Court refused, holding "current effects alone cannot breathe life into prior, uncharged discrimination." In other words, Ledbetter needed to have alleged and proven that a discriminatory pay decision, not just the effects thereof, occurred in the 180-day period before she filed her charge to have had a viable claim.** The majority also dismissed Ledbetter's and the minority's fervent arguments that pay discrimination was especially apt to escape detection until far more than 180 days after the discriminatory act, finding that Congress had considered that and declined to enact special procedures.

In ruling for Goodyear, the Court distinguished Ledbetter's claim from Equal Pay Act (EPA) claims. The EPA has a two year statute of limitations (three years for willful violations), which the courts have construed as meaning that the plaintiff-employee can recover for each paycheck in the statutory period, even if the initial discriminatory decision is outside of that period. Also inapplicable to *Ledbetter*, the Court ruled, was *Bazemore v. Friday*, a previous U.S. Supreme Court decision regarding Title VII and pay. In *Bazemore*, the plaintiffs were black men who had previously been subject to a segregated workplace and a facially discriminatory pay plan. When the company merged the white and black workforces, it did not remedy the discriminatory pay plan, which had its roots long before the enactment of Title VII. Where the pay disparity was facially discriminatory, the Court held, each paycheck is a new discriminatory, intentioned act. In contrast, where the pay policies were facially non-discriminatory and neutrally applied, as in *Ledbetter*, each paycheck was not a renewal of the old violation.

While the decision is reported in the media as a boon to business (it's not), employers should also be aware that, in response to this ruling, plaintiffs' attorneys and advocacy groups will encourage a mentality of "file now, ask questions later" where pay disparity is involved and perhaps invoke—among sex discrimination claimants—a renaissance of Equal Pay Act filings. However, the Ledbetter decision suggests that in gender discrimination pay claims, the Equal Pay Act is the safest path to pursue. The financial remedies under the Equal Pay Act are not as attractive as under Title VII. Over the longer term, employers should keep their eyes peeled for changes to pay provisions in Title VII, as requested by the dissenting opinion and as promised by Sen. Clinton of New York.

"WORD OF MOUTH" HIRING LEADS TO CLASS ACTION LAWSUIT

A U.S. District Court on May 16, 2007 certified a national class action against Wal-Mart, covering African Americans who during the last six years either applied for jobs as Wal-Mart over the road drivers or were deterred from applying. *Nelson*

v. Wal-Mart, Stores, Inc., (E.D. Ark.). The court concluded that class claims for punitive damages were inappropriate, but the class can proceed for declaratory and injunctive relief and back pay. Wal-Mart employs approximately 8,000 drivers.

According to the court, Wal-Mart established as a company policy that drivers should be hired based upon "word of mouth" from current drivers. Current drivers are given cards to distribute to potential candidates. The cards provide contact information from Wal-Mart in the event an individual wants to apply for the job. Applicants are screened by current drivers, then the process involves reviews by different levels of management. The court stated that those who are involved in the interviewing and hiring process have "the authority to hire unfettered by any objective criteria."

The number of African American drivers employed by Wal-Mart during the relevant time period ranged from four to six percent; evidence showed that African Americans comprised approximately 15% of the total U.S. truck driver work force. **The court concluded that there was evidence to substantiate the claim that Wal-Mart's word of mouth hiring policy and the lack of specific criteria to select drivers had a discriminatory effect based upon race.**

We understand an employer's need or desire to use word of mouth hiring, particularly when it is difficult to find qualified applicants. However, we recommend that employers not rely on word of mouth, alone. At a minimum, a "word of mouth" process should also include an open process, whether advertisements in newspapers or on websites, so that the process truly offers "equality of opportunity." The laws prohibiting workplace discrimination do not require equality of outcome; they require equality of opportunity. The problem with word of mouth, alone, is that a claim could arise that such a practice has a discriminatory impact based on protected class status, and thus lack of equal opportunity.

WASHINGTON NEEDS MONEY – LOOKING AT CONTRACTOR OR EMPLOYEE STATUS

On May 8, 2007, a U.S. House Ways and Means subcommittee conducted a hearing on how much money the U.S. government is losing due to the misclassification of employees as contractors. The hearings also focused on benefits denied to contractors, such as workers' compensation and unemployment.

Business representatives testified that an employer can easily become confused with the rules determining whether an individual should be classified as an employee or independent contractor. Advocacy groups alleged that employers often intentionally misclassify individuals to avoid paying taxes, benefits, and insurance. **According to the Government Accounting Office, the U.S. Government lost approximately $4.7 billion in income taxes in 2006 based upon employers who had incorrectly classified individuals as independent contractors rather employees.**

At a minimum, the impact of congressional oversight on this issue will be tougher enforcement standards by the United States Department of Labor and the IRS when they become aware of an individual who is classified as an independent contractor. Here are key points for employers to consider for an individual to be a bona fide contractor:

- Does the individual hold himself or herself out as an independent contractor?
- Is the individual working side by side with employees performing the same work as those who are classified as employees?
- Is the individual free to make his or her services available to the employer's competitors?
- Does the employer control or have the right to control the individual's actions?

- Does the individual use his or her own tools an equipment or those provided by the employer?

- Is there a bona fide agreement with the individual specifying the nature of the independent contractor relationship?

Perhaps the most critical issue of all is the actual or right to control or direct the actions of the individual. For example, if an individual retires or leaves employment and returns as a "consultant", is that individual exclusive to the employer or free to work for others? Is there an agreement establishing that relationship? Is the individual directed or instructed in how to perform his or her duties as a consultant? Employers should be careful not to just change a label - - employee to contractor - - but in fact change the dynamic of the relationship.

OSHA TIP: OSHA AND REPEATED VIOLATIONS

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.

An employer may be cited by OSHA for a repeated violation if that employer has been cited previously for a substantially similar condition and that citation has become a final order of the Occupational Safety and Health Review Commission. The agency views it as a repeated violation if it occurs within 3 years from the date that the earlier citation became a final order or from the final abatement date, whichever is later. There is no statutory time limit but OSHA has chosen the three year period to ensure uniformity. Federal OSHA citations show an increase of 36.6% in repeated violations during the period FY 2002 to FY 2006. Repeated violations can bring a civil penalty of up to $70,000 for each violation. To determine the penalty for a repeated violation, it is first classified as a serious or other-than-serious violation. A gravity-based penalty is then calculated in consideration of the likely severity and probability of a resultant injury. For a smaller employer (under 250 employees) this amount is doubled for the first repeat violation and quintupled if the violation has been cited twice before. For a larger employer the gravity-based penalty is multiplied by 5 for the first repeated violation and 10 for the second occurrence. If the current violation is classified as other-than-serious and would not normally carry a monetary penalty, a minimum penalty of $200 is assessed for the first repeated violation, $500 for the second and $1,000 for the third. It should be noted that an other-than-serious violation forms the basis for a repeated violation just as effectively as if it were classified as serious.

Multi-facility employers should know that repeated violations may be based upon a recurrence of the violation at any of its sites nationwide. Also for nonfixed establishments, such as construction sites, repeated violations may be alleged based on prior violations occurring at any of the employer's identified sites nationwide. OSHA compliance officers are directed to obtain a nationwide citation history (within federal enforcement states) for an employer when they judge the current violation to be "high gravity serious." Such violations are defined as those where there is a high probability of death or serious physical harm. For lesser gravity violations the Area Director is encouraged to seek a national inspection history where it appears a large number of serious, willful or repeat violations may result. In those instances where a national history is not obtained, a multi-facility employer may be cited for repeated violations recurring at worksites within the same OSHA area office jurisdiction.

Not infrequently OSHA must determine whether a violation should be alleged as "willful" rather than repeated. The Field Inspection Reference Manual notes that repeated violations differ from

willful violations in that they may result from an inadvertent, accidental or ordinarily negligent act. The manual states that where a repeated violation may also meet the criteria for willful, but not so clearly, a citation for a repeated violation shall normally be issued.

EEO TIP: SOLVING THE PROBLEM OF "ENGLISH ONLY" RULES AND POLICIES

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.

Given the plethora of publicity concerning illegal immigration, it is understandable that some employers might be confused as to how far they can go without violating federal employment anti-discrimination laws. Issues pertaining to English-only rules do not apply solely to illegal immigrants but also to bona fide citizens who primarily speak languages other than English. There are nearly 11 million residents who are not fluent in English, an increase from 6.6 million 1990. According to the U. S. Census Data for 2003, nearly 34 million residents are foreign-born; that is up from 24.6 million in 1996.

The obvious problem that employers face is how to enforce their own communication polices that have a significant impact on customer service, safety standards or other working standards that are business related. While cases are being filed almost daily, two cases were reported within the last two months which address some of the major issues.

For example, the EEOC, in March filed a lawsuit against a Salvation Army Thrift Store in Framingham, Massachusetts, alleging a violation of the English only rules under Title VII. In substance, the EEOC alleged that the Salvation Army had violated Title VII by discharging two employees on the basis of their national origin by requiring them to comply with the Salvation Army's English language rules and because of their failure to meet the store's English proficiency requirements. The two employees in question were "clothes sorters" and had worked for that Salvation Army Store for approximately five years. One of the employees was from the Dominican Republic and the other was from El Salvador, both spoke mostly Spanish at the work place; neither was fluent in speaking or understanding English. However, according to the EEOC they had performed the duties of their positions "commendably."

The policy in pertinent part states as follows:

> "…This policy states that at all times while on the center premises, other than during break and meal periods and before and after work, every employee shall utilize English, to the best of the employee's ability, when speaking to any other employee, beneficiary, customer or to a supervisor. This rule shall not apply to conversations between employees held in nonworking areas, such as lunch room, break room, and restrooms…"

In answer to the EEOC's Complaint, the Salvation Army asserted that its English Language Policy had been in the Employee Handbook for a number of years but that no attempt to enforce it was made until 2004. The Salvation Army further answered that in deference to those employees who could not speak English fluently, enforcement of the English Language Policy would be delayed one year to allow such employees to learn English and to acquire at least a working knowledge of spoken English and to demonstrate some progress in learning English.

Since only the Complaint and an Answer have been filed at this point in the case, we must

await a ruling by the court as to whether the Salvation Army's attempt to enforce its English Language Policy constituted a violation of Title VII. However, based on the pleadings to date from our perspective both sides face a number of obstacles. The EEOC will have to grapple with the fact that the employer's English Language Policy appears moderate and reasonable in terms of its coverage, (i.e. no blanket requirement that English be spoken at all times). In fact it would seem to be in total compliance with the Commission's own guidance on that subject. However, as to the employer, there is a question as to whether the policy can be justified by business necessity. The two employees who were terminated apparently performed the duties of their positions effectively notwithstanding their lack of fluency in English. The employer's admission in its Answer that there had been no incidents during the five-year period of their employment would seen to indicate that there was no need for speaking English for purposes of instructions, safety reasons or the efficient performance of their jobs. The Court of course will have to determine the truth of these assertions and weigh there probative value based upon the facts obtained during the course of discovery or at trial.

A second case involving a hairstylist, Gloria Maldonado, who was fired from the Beauty Salon at the Town and Country Manor, a facility for senior citizens in Santa Ana, California because she objected to the employer's English-only rule. The hairstylist, who was bilingual, objected to the requirement that she must speak English at all times when Town and Country residents were present, even if she was conversing with friends or other customers who spoke only Spanish. The employer stated that the English-only rule was implemented in 2004 because the Center was issued a warning by the California Department of Health after some residents complained that they didn't like it when staff members spoke in a foreign language while providing nursing care.

EEO TIP: While there may not be a universal solution to the enforcement of English-only rules, there are a number of general concepts that employers should keep in mind to avoid violations of Title VII's prohibitions against discrimination on the basis of national origin.

First, as a general matter the Commission's Regulations found at 29 C.F.R. 1605, et seq. indicate that:

- Citizenship, per se, is not a requirement for coverage under Title VII. Depending on the circumstances, discrimination against non-residents, aliens and undocumented workers may be a violation of Title VII on the basis of national origin, and that

- State laws which regulate or prohibit the employment of non-citizens may be superseded where they are found to be in conflict with Title VII.

Secondly, the EEOC will usually "presume" that a violation has occurred whenever an employer issues an English-only rule which prohibits employees from speaking another language **"at all times"** in the workplace. **The EEOC, however, will usually allow employers to enforce a rule which requires employees to speak English only at certain times or under certain specified circumstances if it can be justified by business necessity. The following defenses can be raised by an employer to justify the rule on the basis of business necessity:**

- That it enhances good communication in general but most importantly among co-workers, especially where safety would be a factor in their communicating clearly to each other for safe job performance and/or emergencies.

- That it is necessary for good communication between other employees

and English- speaking customers and clients.

- That it is necessary for good communication between employees and supervisory personnel for purposes of instructions, assignments and directions.

- That it is necessary for maximum, efficient productivity. Having to use an interpreter or restate instructions may slow productivity and be less efficient.

- That it is better for customer and co-worker relations. However, the matter of customer or co-worker preference may require a showing that such a preference is essential to the safe and efficient performance of the job or operation of the business. The EEOC will likely require clear evidence to sustain this defense.

Finally, employers should be aware that an improperly drafted English-only rule may result in a charge of "adverse impact" because of national origin upon those employees whose primary language is not English. If such an allegation is made, the employer may have to show that the rule was justified by business necessity and that no other rule could be made which would have less of an impact on the employees in question.

The foregoing barely scratches the surface in terms of the potential issues pertaining to English-only rules. If you have questions, or are if your firm is contemplating the implementation of an English-only rule, we would be pleased to assist you in this effort. Please feel free to call me at (205) 323-9267.

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.

While Fair Labor Standards Act litigation continues to be prevalent, there also continues to be much interest in the Family and Medical Leave Act (FMLA). First, DOL has indicated they intend to issue some revisions to the FMLA regulations (which were last revised in 1995) in response to a 2002 U. S. Supreme Court decision (*Ragsdale v. Wolverine Worldwide, Inc.*) invalidating a portion of the regulations. Although DOL had stated they would issue the revised rule by March 2005 nothing has been published at this time. There are a couple of areas where most employers would like to see substantial changes. They are medical certification and employee notification. Both employer and employee representatives have begun to weigh in on the issue with employers requesting less stringent requirement while the employee groups are asking that no major changes be implemented.

In a related area, two members of Congress have introduced legislation that would require employers to give full-time workers at least seven days of paid sick leave per year that could be used for routine medical appointments, to care for family members or for the employee's own illness. The proposed Healthy Families Act would apply to all employers with fifteen or more employees. The requirements would apply on a pro-rated basis to part-time employees who work at least 20 hours per week.

The U. S. Sixth Circuit Court of Appeals, in April, ruled that the company controller was entitled to the protections of the FMLA even though she

suffered no adverse action. The employee had made several requests for maternity leave to which the company did not respond. After the employee's doctor ordered her to stop working, the employer advised the employee that she would receive six weeks of paid leave and that she could use whatever additional leave she had. When the employee returned to work she was required to furnish a 'fitness for duty" certification. Further, she was told that she had the option of remaining with the company or leaving with a severance package and that she would "probably" be demoted. The employee resigned the following day stating that she had been given "no other alternative but to resign immediately." The employee sued alleging that she had been constructively discharged and the court ruled that the employer had incurred technical violations due to its failure to respond in a timely manner to the employee's request for FMLA leave. However, the appeals court concluded that these technical violations were insufficient to establish a FMLA claim. The circuit court reversed the ruling and stated that she could proceed with her action as the FMLA provides that an employer may be sued for interfering with FMLA protected rights.

In another FMLA case, a U. S. District Court in Illinois addressed the issue of joint employment when determining whether an employer meets the 50-employee threshold. The employee was employed by a contractor who had 48 employees to provide maintenance and repair services at a shopping center. Simon Property Group, which operated the shopping center, had at least 10 employees within a 75-mile radius. The Court held that the firm was not entitled to summary judgment but that the matter should proceed to trial.

A U. S. District Court found that an employee was entitled to the protection of the FMLA even though she had not yet been employed for 12 months. An employee was hired in July 2003 and in January 2004 she notified the employer that she was pregnant with the baby being due after July 2004 and requested FMLA leave. Within two weeks of the notification the employee was subjected to a predisciplinary conference, a written reprimand and a negative performance evaluation. After the employee was fired she filed suit alleging retaliation under the FMLA. The court found that since she would have worked more than 12 months by the time the requested FMLA leave was scheduled to begin she was entitled to protection under the Act.

The U. S. Fifth Circuit Court of Appeals recently ruled in another FMLA case that an employee was not protected by the Act. The employer, headquartered in Baton Rouge, LA, was providing construction services on a project in Fernwood, MS. Neither location had 50 employees but the combined number at both locations was 55. The issue before the court related to how to determine the distance between the two locations. The distance was only 68 linear miles "as the crow flies" while the driving distance on public roads was 88 miles. The Court found that the DOL regulations specifically stated that distance would be measured by surface miles using surface transportation over public streets, roads … Consequently it was determined that the employee was not protected by the FMLA since there was more than 75 miles between the two locations and there was not 50 employees at either location.

Service Contracts Act employers: Note that effective June 1, 2007, the fringe benefit rate for all contracts that start after that date increases to $3.16 per hour.

A recent survey of 400 large and small employers by the Society for Human Resource Management found that the Wage and Hour Division had ever audited only about twenty percent of employers. However, there continues to be much private litigation under the Fair Labor Standards Act and the Family and Medical Leave Act. Remember that in contrast to fair employment practice statutes, there is no requirement under the FLSA or FMLA to file an

administrative charge prior to suing. Therefore, employers should be very aware of their potential liability and make sure they are complying with these statutes to the best of their ability. If we can be of assistance do not hesitate to contact me..

LMV UPCOMING EVENTS

June 5, 2007
Webinar
Document Retention: The Electronic Time Bomb
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 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 it's too late, as well as how to structure your document retention policy so you don't get sanctioned. Visit our website lehrmiddlebrooks.com to register.

June 19, 2007
Webinar
Immigration
The emphasis of this webinar will be two-fold as we address the challenges of complying with evolving immigration requirements while balancing conflicting public perception interests. First, we will explore the employer's obligation to comply with applicable immigration laws related to employment authorization verification. Included will be discussion of recent Immigration and Customs Enforcement raids on employer work sites and the impact of those raids including private litigation that followed the raids. Second, the webinar will include an introductory discussion of visas and the current status of visa processing, including delays, in the United States. Also included will be a discussion of any new or pending immigration legislation. Visit our website lehrmiddlebrooks.com to register.

June 20, 2007 (Max Federal Credit Union Auditorium, Montgomery, AL)
Max Federal Credit Union Management Roundtable

June 21, 2007 (Bruno Conference Center, Birmingham, AL)
Retail, Service & Hospitality Industry Update
This complimentary briefing is intended to provide the attendees greater knowledge of legal issues specific to their industry. Speakers include representatives of the United States Equal Employment Opportunity Commission, who will discuss their initiatives regarding what they believe are discriminatory practices in retailing. The program will also discuss wage and hour issues, including exemption and child labor concerns, third party harassment (such as from customers or visitors), and current safety and health matters. Visit our website lehrmiddlebrooks.com to register.

For more information about Lehr Middlebrooks & Vreeland, P.C. upcoming events, please visit our website at www.lehrmiddlebrooks.com or contact Maria Derzis at (205) 323-9263 or mderzis@lehrmiddlebrooks.com.

DID YOU KNOW…

…that the Change to Win Coalition on May 22, 2007 announced an expanded relationship with China's national union? According to Anna Burger, Chairwoman of the Change to Win Coalition, "We think that this is just the first step in building a relationship that can have a positive impact on the workers of the world." China has drafted its first statute to address standards regarding hiring, firing and compensation. At this time, the Change to Win Coalition is only sharing information and strategies with the "National" union of China; we expect this to become more formalized. Note the Change to Win Coalition's initiatives conflict with those of the AFL-CIO, which blames China in part for the decline in union represented manufacturing jobs.

…that sexually derogatory behavior not directed toward the individual complaining about harassment can still be considered harassment? *E.E.O.C. v. Big Valley Auto and Chuck Daggett Motors*, (10th Cir. May 14, 2007). Employee Segovia worked as a sales representative and ultimately became sales manager. The person to whom she reported, the owner, made comments such as "women belong at home barefoot and pregnant," told Segovia that "I don't want a whole bunch of damn women working here. Men don't like to work with women," and frequently referred to Segovia as "that bitch" when talking to others about her. According to the court, "We think a jury should decide whether these comments were made because of a gender animus. The facts, when taken together and in the light most favorable to the E.E.O.C., could reasonably support a finding that a work environment was charged with gender-biased and sexual animus."

…that a United States federal court on May 15, 2007 ruled that H-2B guest workers are covered by the Fair Labor Standards Act? *Castellanos-Contreras v. Decatur Hotels*, (E.D. La). The employees claimed that they were not reimbursed for travel, visa and recruiting costs, which violated the Fair Labor Standards Act by effectively reducing their hourly rate during their first week of employment to below the minimum wage. According to the court, "neither Congress nor the relevant federal agencies have ever stated that H-2B guest workers are not entitled to the protection of the FLSA. By its own terms, the FLSA applies to all employees," that is, to "any individual employee employed by an employer." This case involves a claim of potentially 300 employees who each paid between $3,500 and $5,000 for recruiting, visa and travel costs to work at the employer's New Orleans hotels after Hurricane Katina.

…that a $550,000 retaliation verdict was unsupported by evidence and thus vacated? *Butts v. McCulloch*, (6th Cir., May 2, 2007). This jury trial resulted in damages against the International Association of Machinists for allegedly refusing to refer a member to a job at the Tennessee Valley Authority. The member had previously talked to the union about filing an age discrimination change against the TVA. In reversing the jury award, the court stated that other than expressing an interest in filing a discrimination charge against TVA, the employee offered no other facts that support him on the ultimate question of retaliation. "Assuming that the prima facia case and pretext evidence may have scraped past the minimal threshold required summary judgment, we do not find them strong enough to establish a case of retaliation on their own, particularly in light of IAM is compelling argument that it would have had no reason to retaliate against [the employee] when his efforts to file a grievance were directed toward TVA, not IAM."

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