"Your Workplace Is Our Work"®

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

Employment Law Bulletin

To Our Clients And Friends:

The answer to the question of "Who is a Supervisor?" may have significant impact on an employer's risks and responsibilities. For example, does this individual qualify as an exempt employee under the Fair Labor Standards Act? Is this individual precluded from becoming part of a bargaining unit in an organizing campaign? Do the individual's actions potentially bind the employer? It is this last question which we would like to address in the context of workplace harassment claims.

In the case of *Merritt v. Albermarle Corp.* (8th Cir. August 6, 2007), an individual employed by an employee leasing firm alleged that her onsite supervisor repeatedly made unwelcome sexual overtures toward her. When she resisted, she alleges that he told her that if she did not submit to his sexual advances, he would take steps for the leasing company to remove her from the premises. She claims that as a consequence of the behavior, she began drinking extensively. She did not report the behavior to the leasing company or the supervisor's employer, but walked off the job and sued.

In concluding that the "supervisor" was not a supervisor, the court stated that he lacked authority to:

- take action regarding hiring, firing, demotion or promotion;
- assign employees different job duties; he could only assign employees job duties within the scope of their general job tasks; and
- take a tangible employment action against the employee.

The court concluded that the authority of the "supervisor" "was no greater than that possessed by [a] team leader." Accordingly, even if the "supervisor's" behavior rose to the level of actionable sexual harassment, the employer was not vicariously responsible as the individual did not have sufficient authority to qualify as a supervisor.

The importance of this issue may also be illustrated in *Alahama v. Wal-Mart Stores* (E.D. Cal. August 7, 2007). The court will let a jury decide whether the lead person qualifies as a supervisor. Evidence supporting such an argument includes that he was given keys to the store and cash register and directed the work of employees in his department.

Employers using "team leaders", "lead people" and "step-up supervisors" should make those individuals aware that the company holds them to a higher degree of accountability regarding their behavior compared to those employees they direct or supervise, even if they do not meet legal tests for defining a supervisor. Holding a lead person to a higher level of accountability does not create the risk of turning a lead person into a supervisor. Rather, such a proactive approach reduces the risk of lead people engaging in behavior for which an employee may allege was the employer's responsibility.

NEW REGULATION SOLVES THE SOCIAL SECURITY NO-MATCH LETTER RIDDLE

Employers have faced a quandary in recent years when they received a letter from the Social Security Administration ("SSA") advising them that the social security number provided by one or more of their employees does not match the information that SSA has on file for the particular number ("no-match letter"). The no-match letter provides constructive notice that the document used by the employee to verify employment eligibility on the I-9 form *may* be fraudulent, meaning that the employer has a duty to further investigate its validity. What an employer is required to do after receiving the letter has been quite a conundrum as employers attempt to balance their IRS and SSA obligations to correctly withhold social security and payroll taxes with their INA obligations not to discriminate based on ethnicity or national origin and to only employ authorized persons. **On August 15, 2007, the Department of Homeland Security's ("DHS") Bureau of Immigration and Customs Enforcement ("ICE") published a final regulation, originally issued as a proposed regulation in mid-June 2006, providing clarification and guidance for these circumstances. The regulation is effective September 14, 2007.**

The Employer's Obligation: An employer has a duty not to knowingly employ or continue to employ persons who are not eligible to work in the United States. At the outset, the regulation (8 CFR Part 274a) adds the failure to adequately address a no-match letter (either from SSA or, less commonly, DHS) to the current list of employer conduct that *may* result in a determination that the employer had constructive knowledge that it was employing unauthorized workers. Note that the no-match letter will only be a factor that is considered under the totality of the circumstances, but it is certain to be a significant if not dispositive factor in determining whether the employer had knowledge.

What Can Employers Do: The regulation provides a three-step process to address the no-match situation. If an employer follows the three-step process, ICE will not use the no-match letter as evidence of constructive knowledge of unauthorized employment, a so-called "safe harbor" from the constructive knowledge imputed from the no-match letter.

The three-step process:

Step 1: Within thirty (30) days (note increase from 14 days in proposed regulation) of receiving the no-match letter, the employer must review its records to determine whether the discrepancy resulted from a typographical, transcription or other clerical error by the employer and inform SSA of the correct information as

instructed by the no-match letter. The employer must also verify that the corrected name and number match SSA records. An employer can verify SSNs on the web (www.ssa.gov/employer/ssnv.htm) or by telephone (1.800.772.6270).

Step 2: Where the employer determines that the error is not one in its records, the employer must "promptly request" that the subject employee(s) confirm that the name and social security number in the employer's records are correct. Where the employee represents that the employer's records are in error, the employer must follow the verification procedures outlined in *Step 1* (i.e., correct the data error and verify the new information with SSA) for the new information provided by the employee. Where the employee states that the employer's records are correct, the employer must request that the employee resolve the discrepancy with SSA. The burden is on the employee to correct the SSA information and the employee has ninety (90) days (increased from 60 days in the proposed regulations) from the date that the employer received the no-match letter to resolve the discrepancy. The employer must inform the employee that it received the no-match letter on *x* date and that the employee has ninety days from *x* date to resolve the discrepancy. In either of these cases, the employer should update the subject employee's I-9 noting on the I-9 what has been updated. Where the employee is unable to correct the discrepancy within ninety days, the employer should proceed to Step 3.

Step 3*:* Where Step 1 and Step 2 fail to resolve the discrepancy, the employer essentially restarts the employment eligibility verification process (I-9) over and the employee has three days to provide materials to complete the I-9. The same standards for initial I-9 completion apply except (1) no document containing the "no-match" SSN or alien number can be used in completing the new I-9, (2) no receipt for a replacement document can be used, and (3) no document without a photograph may be used to establish identity or both identity and employment authorization.

Where Steps 1 - 3 fail to resolve the discrepancy, the employer must elect between terminating employment or risk a potential determination that the employer had constructive notice that the employee was unauthorized. The choice is simple unless you are an employer who receives a no-match letter for a significant percentage of your employees or the employees for whom the no-match applies are essential to your operation (e.g., your crew leader or primary interpreter). In that case, a true risk assessment must be made between the benefits of continued employment and the potential penalty that could be imposed (up to $2200 per unauthorized worker for a first time offender) where you are found to have knowledge of unauthorized employment. It should be noted that adherence to the safe harbor process will not eliminate the possibility of sanctions and/or liability, it simply removes the no-match letter from the equation. If an employer has other knowledge that the employee is unauthorized, either actual or constructive, the employer can be held responsible even if the employer followed the no-match procedure.

"ON CALL" ANXIETY MAY BE COVERED BY THE ADA

An individual who is discharged for refusing to remain "on call" due to anxiety may have a

disability under the ADA, ruled an Arizona court in the case of *Zubkov v. Arizona Health Care Cost Containment System* (D. Az. August 9, 2007). Zubkov worked as a data base specialist. He and other such specialists were placed on a rotating on call schedule. Zubkov objected, stating that he has a general anxiety disorder and that condition would be aggravated by being on call.

According to the doctor's statement to the employer, Zubkov's condition means if he responds to a call, he will have difficulty getting back to sleep and that such a loss of sleep "builds and escalates over time." The doctor said that Zubkov could work longer days, but could not be on call.

The employer refused to excuse Zubkov from on call responsibilities. The employer said that if Zubkov responded to a call, he could report to work the next day at a later time. Ultimately, Zubkov filed for disability benefits and was terminated. Zubkov's claim also included retaliation, as two days before he and others were put on call, he raised a concern with the employer's human resources office about age and national origin discrimination.

In permitting the case to go to trial on the disability question, the court stated that based upon Zubkov's doctor's opinion, there was a question of fact regarding whether he was disabled under the ADA and, therefore, it was a matter for the jury to consider. Where an employee has a medical condition which the employer believes is not a disability, an employer still cannot "go wrong" by conducting a reasonable accommodation analysis. In this case, the outcome may have been the same – termination – but the employer may have avoided a jury trial.

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.

Even though we are in the normally slow summer season, there continues to be much activity in the area of Wage and Hour law and problems. First, the increase in the minimum wage ($5.85 per hour effective on July 24, 2007) does not seem to have made a large impact on most employers. Apparently, employers are paying in excess of $5.85 to almost all of their employees. When the other increases become effective in July 2008 ($6.55 per hour) and July 2009 ($7.25) I expect that several employers will have to increase their basic pay rates.

The U. S. House of Representatives recently passed a bill increasing the penalties for serious violations of the child labor laws. The bill would increase the penalty to $50,000 (from a maximum of $11,000) for violations leading to death or serious injury of a minor under 18. If the violation was determined to be repeated or willful the penalty could be as much as $100,000. A similar bill has been introduced in the Senate.

The President's Commission on Care for America's Returning Wounded Warriors has recommended expanding the FMLA to allow 6 months of unpaid leave to allow spouses and parents to care for seriously injured soldiers. The following day a bill was introduced in the Senate provide for the additional leave.

Recently, there have been several notable instances where employers were required to pay large amounts of back wages:

1. Borders, Inc. (a large nationwide book retailer) was ordered to pay a fired

employee over $300,000 in back wages and to reinstate the employee. Although the amount of back wages was considerably less, the jury awarded $175,000 in compensatory and punitive damages and the judge awarded liquidated damages. In addition the judge allowed the employee's attorney to seek fees that are indicated to be in the $500,000 range. The case began when a Borders Human Resource official told the employee that she should be compensated for her unpaid overtime hours. When the company failed to compensate the employee she filed suit and was terminated shortly thereafter. Further, the court awarded the employee back wages for a four year period (instead of a three year period for willful violations), stating that the statute of limitations had stopped running because the company had indicated they would investigate her complaint but never informed the employee of the results of their inquiry.

2. The First U. S. Circuit Court of Appeals recently held a Puerto Rico hotel owner personally liable for minimum wage and overtime violations. The hotel owner, who had kept two sets of timekeeping books, was ordered to pay almost 300 employees some $280,000 in wages and liquidated damages. In its opinion the court pointed that the definition of employer in the Fair Labor Standards Act includes "any person acting directly or indirectly in the interest of an employer in relations to an employee."

3. The Fourth U. S. Circuit Court of Appeals, for the second time, has ruled that the Family and Medical Leave Act prohibits employees from waiving their rights. The court further stated that in order for settlements to be enforceable a court or the Department of Labor must either approve them. While this opinion is not binding in Alabama since we are under the Eleventh Circuit Court, employers should be very careful in settling of FMLA cases as well as FLSA cases without approval of a court or Wage and Hour.

4. In order to settle litigation brought by Wage and Hour, a Connecticut substance abuse treatment facility has agreed to pay $1.1 million to almost 150 employees. The minimum wage and overtime violations occurred due to full time employees routinely working unrecorded and unpaid hours. The average employee received $7500 with the largest payment exceeding $35,000.

5. Toyota Motor Manufacturing has offered to pay $4.5 million in back pay to paint shop employees at its Georgetown, Kentucky plant to resolve a dispute over "walk time." The issue involved the "donning and doffing" of protective clothing and walking to and from the employee's workstations which Toyota estimates could take as much as 8 minutes per day. The company projects the pay out would average $1000 to an employee for a full year of work.

Recently I read that during the 12-month period ending March 2006 (latest period for which national data is available) there were almost 4400 Wage and Hour suits filed in Federal District Court. This exceeds the previous year by more than 900 and is 10% more than the previous largest year. Recently, the Orlando Sentinel reported that there have been over 500 wage hour suits filed in Orlando during the first 6 months of 2007. This compares to only 50 that were filed during the same period in 1997. Due to the continuous amount of activity in the Fair Labor Standards

Act and Family and Medical Leave area employers should continually review their pay practices to ensure that they comply with the act. If I can be of assistance to you do not hesitate to contact me.

EEO TIP: EEOC'S REVISED REGULATIONS ON AGE MAY HELP EMPLOYERS

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.

The EEOC, during July 2007, issued revised regulations and/or clarified its position on two aspects of Age Discrimination which should be of some benefit to employers.

First as to Retiree Health Benefits, the EEOC made final its proposed rule which would allow employers to offset any benefit that an employee could receive under the federal government's Medicare Program against the benefits that would otherwise have been payable under the employer's own retirement plan. **Secondly, as to discrimination within the protected group**, that is discrimination between employees over the age of forty (40), the EEOC clarified its regulations to state that discrimination against the younger employee is not unlawful under the Age Discrimination In Employment Act (ADEA). Both of these revisions should make it easier and/or less costly for employers to devise programs that could be beneficial to retirees and older employees without violating the ADEA.

<u>Some Background Information On the EEOC's Actions</u>

Retiree Health Benefits: That old saying that "If its not broken, don't fix it" would apply to the EEOC's actions with respect to retiree health benefits. Over the last 20 years or so, prior to the EEOC's current actions, employers had consistently taken the position that it was not "unlawful" to offset retiree benefits payable under their corporate health benefit plans against the benefits that such retirees could receive when they became eligible under the federal Medicare Plans or under similar state health benefit plans. It seemed to have been assumed (apparently even by the EEOC) that such plans were "outside of the scope" of those employee benefits which would require a showing by the employer that the offsetting had met the "equal cost/ equal benefit" requirements of the ADEA, namely 29 U.S.C Section 623 (f)(2)(B)(i).

Unfortunately, in retrospect for the EEOC, along came the case of the *Erie County Retirees Association v. County of Erie* (3rd Circuit, August, 2000) in which certain Erie County retirees, aged 65 or older, alleged that the practice of offsetting retiree health benefits against Medicare benefits at the point of their eligibility was discriminatory under the ADEA, because it forced retirees to pay a slightly higher premium under Medicare Part B than non-retirees of the same age or younger employees had to pay under the employer's health benefit plan. Initially, the EEOC agreed with the retirees and filed an amicus brief in support of the retirees' position. The trial court ruled in favor of the County, holding that the ADEA did not apply to the actions by the County because of the "Safe Harbor" provisions of the ADEA. However, upon appeal, the 3rd Circuit reversed and remanded the case to the district court holding that the County was not entitled to the "Safe Harbor" provisions of the ADEA (under which an employer could provide certain benefits under a bona fide benefit plan) because (1) the benefits being provided to the retirees were in fact inferior to those being offered to employees who were not eligible for Medicare, and (2) because the County had not met the requirement of proving that the benefits were of equal cost (in this

instance) in order to comply with 29 U.S.C Section 623 (f)(2)(B)(i) mentioned above.

The EEOC promptly adopted the holding of the 3rd Circuit as its own official enforcement policy on the matter. Incidentally, at the time the 3rd Circuit was the only circuit to have ruled on this issue.

Upon adopting the 3rd Circuit's holding as its own, the EEOC was strongly criticized by many organizations, including labor unions and the American Association For Retired Persons (AARP) who saw the policy as an impediment to negotiations of health benefits in labor contracts, or as a reduction in retiree health benefit plans in general. One of the strongest arguments advanced by these organizations was that since employers were under no legal obligation to provide retiree health benefits to retirees, the EEOC's Rule was a disincentive for employers to continue to provide them at all. As a matter of fact, the number of employers who provided such benefits had already begun to decline. For example, the EEOC found that according to the U. S. General Accounting Office only about one third (1/3) of large employers and less than 10% of small employers offered retiree health benefits in 2000 compared to about 70% in 1980.

Having been confronted with the many criticisms and not wanting to contribute to a further decline in retiree health benefit plans, the EEOC rescinded its new rule in August 2001 to study the matter. After completing its study including a hearing of various commentators on the pros and cons of changing the rule in effect back to where it had been prior to the Erie County Case, the EEOC in July, 2003 issued a new rule (regulation) which in substance was to grant an exemption from the coverage of the ADEA retiree health plans in which retiree health benefits were made to conform to Medicare eligibility.

The AARP, which had been a staunch supporter of the 3rd Circuit's original holding, promptly sued the EEOC to enjoin it from enforcing its new rule on exempting from ADEA coverage the type of retiree health benefit plan in question. This lawsuit was finally resolved this year in July 2007 with the 3rd Circuit upholding the statutory authority of the EEOC to grant such exemptions. Thus, the way was cleared for the EEOC to reverse itself and implement its new rule on the matter of retiree health benefits approximately six years after taking a directly opposite position. In effect, the EEOC has now fixed what really wasn't broken.

As a result of the EEOC's new rule, employers and retirees may take advantage of the retiree's eligibility for Medicare to coordinate such benefits with the employer's health benefits programs. Hopefully it should result in a more reasonable method of designing plans which should be less costly for the employer but still equally beneficial to the employee.

Age discrimination within the protected group. Generally, under the ADEA an employer is prohibited from discriminating against applicants or employees over the age of 40 because of their age. But what about discrimination between employees who are age 41 over employees who are age 51? Or what about employees who are 64 over employees who are 55? It has always been clear that favoring younger employees over older employees because of their age was unlawful even though both were in the protected age group. What has not been clear is whether an employer (for whatever reasons it may have) has a policy or practice of favoring older employees within the protected age group over younger employees who are also within the protected age group.

As with retiree health benefits, the EEOC changed positions on this issue also. In the case of *General Dynamics Land Systems Inc v. Cline* (S. Ct. 2004) the EEOC had first taken a position in support of Cline and a group of other current

and former employees who were similarly situated. Cline, and the others in his group were between the ages of 40 to 49. His employer and union had entered into a collective bargaining agreement in which there was a provision that workers under the age of 50 would be eliminated from certain aspects of the employer's retirement health benefits plan. Cline, knowing that he was within the protected age group, filed a charge with the EEOC alleging age discrimination. The EEOC agreed with his claims. Shortly thereafter he filed suit in federal court alleging a violation of the ADEA. The trial court dismissed the suit on the grounds that the ADEA did not protect younger group members from favoritism on behalf of older protected group members. Both Cline and the EEOC had taken the position that the Act prohibited "any discrimination based on age." Upon appeal the 6th Circuit Court of Appeals reversed and remanded the case to the District Court, which in turn prompted an appeal to the Supreme Court by General Dynamics.

The Supreme Court in substance held that while all employees over the age of 40 are protected by the ADEA, it would not be unlawful for an employer to favor an older employee within the protected age group over a younger employee within the group because one of the primary purposes of the act is to favor the "relatively older" employee from discrimination. Following the General Dynamics decision the EEOC had no choice but to reverse itself and revise its regulations accordingly. Thus, the EEOC's new regulations found at 29 C.F. R. 1625.2 in pertinent part state as follows:

"It is unlawful for an employer to discriminate against an individual in any aspect of employment because that individual is 40 years old or older, unless one of the statutory exceptions applies. Favoring an older individual over a younger individual because of age is not unlawful discrimination under the ADEA, even if the younger individual is at least 40 years old…"
This new regulation does not confer any special rights on older workers, nor does it compel employers to prefer older workers. Additionally, it does not affect applicable state, municipal, or local laws that prohibit such preferences.

Although some organizations have criticized the EEOC's new regulation, employers generally applaud it as a means of making certain justifiable, age-based decisions which could be of benefit to older employees without fear of liability. To some it may even be seen as a lawful means to reward older employees for long-term employment and loyalty to the employer.

If you have any questions concerning retiree health benefits or the implementation of policies and practices which may favor older employers over younger employees within the protected age group, please call this office at (205) 323-9267.

OSHA AND WORKPLACE VIOLENCE

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.

While there has been a reduction in workplace homicides over the past few years, it remains a leading cause of on-the-job deaths. The number dropped from a high of 1,080 in 1994 to a low of 551 in 2004. This excludes those resulting from the September 11th terrorist attack in New York.

A 2005 survey by the Bureau of Labor Statistics found that nearly five per cent of all business establishments had a violent incident within the preceding 12 months. One half of the large employers, with a

thousand or more workers, experienced such incidents.

The National Institute of Occupational Safety and Health has defined workplace violence as any assault, threatening behavior or verbal abuse occurring in the work setting. It includes, but is not limited to, beatings, stabbings, suicides, shootings, rapes, near suicides, psychological traumas such as threats, obscene phone calls, an intimidating presence, and harassment of any nature such as being followed, sworn at or shouted at.

Workplace violence shows itself in various ways, including a recent report of an East Point, Georgia auto dealer who responded to the request of his two employees for a pay increase by shooting and killing them. The following categories may be used to group such violent incidents:

Type I	Violence by strangers (robberies)
Type II	Violence by customers, clients or patients
Type III	Violence by co-workers (supervisors, subordinates or peers)
Type IV	Violence by personal relations (spouse, ex-spouse, relative etc.)

Federal OSHA does not have a specific regulation or rule requiring employers to address the issue of workplace violence. Therefore, the agency must resort to the use of the general duty clause of the OSH Act to compel any corrective action. This requires showing that a workplace condition threatens employees with death or serious physical harm, that the employer knew or should have known of the condition, and that there are feasible means to remove or mitigate the hazardous condition. A review of inspection data posted on OSHA's website suggests that citations for workplace violence are issued somewhat infrequently. It also indicates that the success of upholding such citations upon appeal has been problematic.

A more likely action than a general duty citation would see OSHA issuing a warning letter to an employer. While this requires no corrective action, it puts the employer on notice about a potential hazard and might strengthen OSHA's hand in issuing a future citation.

An example of a general duty citation issued for a workplace violence hazard is one in a hospital setting that involved violent psychiatric patients and staff with training deficiencies. In another case a general duty violation was charged where employees of an apartment complex did not have security measures in place to protect employees from assault and battery by unruly tenants. A retail store was cited for failing to train employees and employ other safeguards such as improved lighting and the like to protect against robberies and assaults. Finally, in one case, a state OSHA program cited an employer for failing to provide a workplace free of assault, battery, threats and intimidation by a manager toward the employees under his supervision.

Employee deaths resulting from workplace violence should be reported to OSHA just as any other type of fatal injury. That does not mean that OSHA will investigate. In most cases they will not. Workplace violence cases should be recorded if they meet the criteria just as any other case. That is, if they are work related and result in death, days away from work, restricted work, transfer to another job, medical treatment, loss of consciousness, or for a significant injury diagnosed by a licensed health care provider.

OSHA has published "Guidelines For Workplace Violence Prevention Programs for Late-Night Retail Establishments" and "Guidelines for Preventing Workplace Violence for Health Care and Social Service Workers." These may be useful tools for an employer in developing a program but they are not mandatory. OSHA

states in a 2004 interpretation letter that such guidelines are not new standards, do not create new duties for employers, and or not to be used as the basis for a citation.

OSHA's website at www.osha.gov offers useful links and information about workplace violence on its Safety and Health Topics page.

LMV UPCOMING EVENTS

September 12, 2007 (Holiday Inn Express, Huntsville, AL)
The Effective Supervisor

September 18, 2007
Webinar
An Employer's Guide to the OSHA Inspection and Citation Process

September 26, 2007 (Vulcan Park and Museum)
HR Leaders and In-Counsel Conference

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 a jury on August 16, 2007 awarded $16 million ($10 million of which was for punitive damages) to a 51-year old executive terminated due to his age? *Morgan v. New York Life Insurance Company* (N.D. Ohio). The $10 million was awarded under Ohio state law; damages caps under federal law preclude such an award. The actions which supported the jury's conclusion that there was malice on the part of the employer were placing Morgan on a performance improvement program when his performance was satisfactory, terminating him when he met five out of the six goals on the improvement plan and replacing him with someone who not only was younger, but whose performance rating was below Morgan's. According to the court, the company "chose to terminate the employment of a 20 year true blue company man because he failed to meet one of six performance targets by one agent as a result of a technicality discovered after the fact." The court added that "although its punitive damages award of $10 million is unquestionably substantial, given the fact that [Morgan's] annual income often approached $1 million, the punitive damages award is neither grossly excessive nor shocking to the conscience."

…that the percentage of foreign born Hispanic workers in low wage jobs in the U.S. declined during a recent ten year period? According to a survey released on August 21 by the Pew Hispanic Center, from 1995 to 2005 those foreign born Hispanics earning less than $8.50 per hour declined to 36% from 42%. According to the report, "during this period, many foreign-born Latinos stepped out of the low wage workforce and headed toward the middle of the wage distribution." Approximately 7.6% of all U.S. workers in 2005 were foreign born Hispanics; approximately 20% of all U.S. workers work at low wage jobs. According to the study, the more recent Hispanic immigrants are working at higher paying jobs than those who have been here longer. Of those who have been in the U.S. less than five years, 50% work at jobs that are in the lower fifth of pay, compared to 64% of those Hispanic immigrants who have been here for longer than five years.

…that on August 15, union-represented employees of the National Labor Relations Board picketed the Agency's headquarters at Washington, D.C.? They also distributed leaflets that called for the resignation of NLRB general counsel Ronald Meisburg. The union represents approximately 1,000 NLRB employees. Meisburg has refused to bargain pending judicial

review of the union's effort to consolidate four bargaining units into one. The placards carried by the picketers stated" "NLRB Unfair to its Employees" and "No longer respects bargaining."

…that denial of overtime can be considered an adverse employment action to support a discrimination claim? *Lewis v. Chicago* (7th Cir. July 26)? Lewis was a plain clothes police officer who was "on the street" dealing with gangs and drug dealers. The police department asked for volunteers to work several hours of overtime for the International Monetary Fund meeting that was to be held in Chicago. The reason her supervisor gave for denying her the opportunity is that he wanted to assign two people to a hotel room for the training session, and because she would be the only woman from their unit, they did not want to pay for a single room. The court agreed with her that the denial of this opportunity was an adverse employment action, as she was denied the training and lost the opportunity for a significant amount of overtime pay.

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