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September 2007
Volume 15, Issue 9

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

Employment Law Bulletin

To Our Clients And Friends:

Seventy-three thousand; $12 billion; $200; 700; 65; $25 an hour? These are the numbers that relate to the UAW strike against General Motors, which began on Monday, September 24, 2007 and ended (tentatively) on Wednesday, September 26. The tentative agreement would reduce the hourly pay for new hires and establish a UAW managed trust to administer retiree health benefits funded primarily by GM. Seventy-three thousand UAW represented employees went out on strike. General Motors has lost over $12 billion during the past two years. Strike benefits would be $200 per week, provided the employees walked a picket line, and it is estimated that the UAW has enough money in its strike fund for a two month strike. GM did not produce 700 vehicles a day in the U.S. during this strike, but it had a 65 day inventory of vehicles. GM's pay and benefits on an hourly basis exceed its foreign competitors by approximately $25 an hour. This was the first strike by the UAW against a big three manufacturer in over 30 years.

During the past 30 years, the Big Three and UAW negotiated increases which were passed along to the consumers in the form of creative financing and increased vehicle costs. The gap in per vehicle cost between the Big Three and foreign manufacturers is too great for this to continue. There are times a company arrives at a historical point where it is willing to take the current economic consequences of a strike to achieve a better long-term financial model. We believe this is the case with General Motors - - we do not see the company settling for anything less than what it believed it needed to become a competitive manufacturer in the United States. When these costs are combined with the slowdown of purchases of the high margin, gas consuming sport utility vehicles, the timing was optimum for GM to take this position.

FLSA RETALIATION

We previously discussed the fact that approximately 30% of all discrimination claims include an allegation of retaliation and why retaliation is one of the fastest growing employment claims in the country. The standard of what is considered "retaliation" is not the same under all statutes. For example, although it takes a low threshold to qualify as "retaliation" under equal employment opportunity laws, the circumstances are different under the Fair Labor Standards Act, as noted in the case of *Boateng v. Terminix*, (E.D. Va, September 4, 2007).

The employee, Boateng, met with his manager regarding his belief that he was not paid overtime. Boateng showed his manager paperwork to substantiate that Boateng worked overtime during several weeks, but received no compensation for it. The next day Boateng was fired. He sued, alleging that he was retaliated against in violation of the Fair Labor Standards Act. The FLSA prohibits retaliation "because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act…" According to the court's interpretation of this provision, **informal, internal complaints to a supervisor are not considered "filing," "instituting" or "causing to be instituted…" a proceeding under the Fair Labor Standards Act and, therefore, the case was dismissed**. Six U.S. Courts of Appeal have heard similar cases, four of which consider such internal complaints to be protected from retaliation and two did not.

If the employee had talked to his supervisor about concerns regarding employment discrimination or harassment, unquestionably a termination would have been viewed as retaliatory. The scope of what behavior is potentially retaliatory is broader under fair employment practice laws than other the Fair Labor Standards Act. In some states, "retaliation" for filing a workers compensation claim is limited only to a termination decision, whereas other states give a broader meaning to the term "retaliation." **The best practice for employers to follow is to ask this question before an employee is either terminated or subject to other adverse decisions: Did the employee recently raise a concern about a subject matter that arguably was protected under the law?"** If the answer to that is yes, then the analysis needs to be such that the employer could show that the reason for the adverse action would have occurred regardless of the employee's expressions of concern. An employer also needs to consider the employee relations implications of an adverse action. Are the "optics" around the decision in this case viewed as speak up appropriately and respectfully about an area of concern, and get terminated the next day?

EMPLOYER NEGLIGENCE FOR INJURIES TO FETUS

An employee who was eight months pregnant was injured when a forklift operator accidentally dropped a load of cardboard boxes on her. Her baby was born prematurely with several medical problems and complications. On August 10, 2007, in the case of *Crussell v. Electrolux Home Products, Inc.,* a federal judge in Arkansas permitted her claim for negligence to proceed against the company.

Less than two years after the accident, the company terminated the employee for poor attendance. The company cited to the employee several absences she needed to take her newborn to physicians and therapists. Two months after she was terminated, she filed a claim under Arkansas tort law, alleging that the company failed to exercise proper care in its forklift operation.

In ruling that the case may proceed to a jury trial, the court stated that **"at least 32 jurisdictions recognize a negligence cause**

of action for non-fatal prenatal injuries if the fetus had reached "viability before the injury occurred." The court also cited the Restatement of Torts, where it states that "one who tortuously caused harm to an unborn is subject to liability for the harm if the child is born alive." Note that this case is not one where the injury to the fetus was within the course of the employee's normal job duties; it arose out of an accident caused by another.

AMERICAN APPROVAL RATE OF UNIONS INCREASES

According to a Gallup poll released on August 31, 2007, approximately 60% of Americans surveyed approve of unions. This question has been asked by Gallup regularly since 1936. The highest positive response was between 1953 and 1957, with a 75% approval rate. The lowest approval rate was between 1979 and 1981, when 55% of Americans said they approved of unions.

Not surprisingly, 78% of those respondents who said they were democrats approved of unions. Interestingly (and maybe surprisingly), 41% of those respondents who said they were republicans approved of unions. Fifty-eight percent of all who said they were independents approved of unions. Sixty-eight percent of those surveyed said they would like for unions to have the same or greater influence in our country today, whereas 28% said they should have less influence.

Is there more significance to this poll result than just the curiosity of it? We think so, particularly when it is considered in light of organized labor's impact on the 2006 elections and potential impact on the 2008 presidential election. If voter dissatisfaction with the handling of the war in Iraq means that voters are dissatisfied more broadly with current administration policies and philosophies, then the electorate may either be ripe for a policy shift supporting unions (such as the Employee Free Choice Act) or look more closely at a union as an option in their own workplace.

MULTIPLE HOURLY RATES TO AN EMPLOYEE PERMITTED

Some employers would like to pay an employee two or more hourly rates during the course of a workweek. For example, if an employee spends a significant amount of time driving to job sites, an employer may want to pay that time at a lower rate than the work the employee performs while at the job site. The case of *Allen v. Bibb County*, (11th Cir. August 17, 2007) affirmed the employer's right to pay employees on that basis. However, the court permitted the case to proceed to trial on the claim that employees were not paid properly for all of their overtime worked.

The employer, a school district, paid bus drivers and monitors different rates based upon the routes they drove. The school district then paid overtime according to a "blended rate" for that workweek. The employees' attorneys argued that different rates may only be paid if employees are performing different jobs. In rejecting that, the court stated that the applicable U.S. Department of Labor regulation "does not mandate that differing rates of pay are only permitted when different types of work are performed."

If an employer pays an employee more than one rate during the course of a workweek and the employee works overtime, the proper way to calculate overtime is according to a "blended rate." That is, the employer should add total pay for that week and divide that pay by the total number of hours worked. That will determine "the regular hourly rate" for all hours worked in that week. Once that rate is determined, the employer then pays one-half of that rate for each hour of overtime

worked. Another approach some employers use is to pay overtime at time and a half based upon the highest hourly rate paid for that week; this is also permissible.

WAGE AND HOUR TIP: WEATHER-RELATED PAY ISSUES

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.

As we are in the middle of another hurricane season and approaching winter there may be instances where employers will be forced to close their business in order to ensure the safety of employees and/or due to the loss of vital services such as electric power. In order to allow you to plan for such an event I decided to try to provide some general guidelines regarding the matter. Below are some of the questions that have been asked in the past.

1. ***When a company closes because of inclement weather, must the company pay an hourly non-exempt employee for the day(s) when the business was closed***?

   A. No. The employer is not required to pay an hourly non-exempt employee for the time when the business was closed. At the company's discretion the hourly non-exempt employee may be allowed to use his/her vacation days.

2. ***If a non-exempt employee is not able to leave the company's facility because of inclement weather, and continues to work, must the company pay the employee overtime for any hours worked in excess of forty (40)?***

   A. Yes. Non-exempt employees who work more than forty (40) hours in a workweek must be paid overtime. If the employee is at the employer's facility more than 24 hours is relieved from duty and provided adequate sleeping facilities the employer may be able to deduct up to eight (8) hours of sleep time per day.

3. ***Must a non-exempt employee who reports to work and then is sent home because of inclement weather be paid for the full day?***

   A. It depends on the pay plan that is in effect for that employee. Some states have state statutes requiring employees to be paid for 2-4 hours of reporting time. Thus, you should check for any state or local laws that may be applicable. There are no such laws in Alabama, Georgia, Florida, Tennessee, Texas or Mississippi.

   If the non-exempt employee is paid on a "fixed salary for fluctuating workweek" pay plan the employee must be paid his/her full salary for the week if he/she works any portion of the workweek**.** Consequently, if your firm was open on Monday but was closed due to inclement weather the remainder of the workweek an employee working under this plan would be entitled to his/her full salary for the workweek.

4. ***How is a salaried exempt employee to be treated for the day(s) when the business was closed?***

   A. The new regulations related to the requirements for exemptions state that "an employee is <u>not</u> paid on a salary basis if deductions … are made for absences occasioned by the employer or

the operating requirements of the business. The Department of Labor has interpreted this to mean that you may not deduct the employee's salary for time missed due to the business being closed for inclement weather. Further they take the position that an employer cannot require the exempt employee to use his or her vacation days for the time period when the business was closed.

Conversely, if the business is open but the employee chooses to not report to work for a full day or more you may dock his pay as provided in the regulations. Also you may charge a partial-day absence against the employee's leave bank as is allowed under the regulations.

While I hope we don't have any more hurricanes this season nor have ice or snow storms that require firms to close for one or more days I hope this will provide you with some guidance should the situation arise. If you have additional questions do not hesitate to contact me.

OSHA TIP: DRUGS IN THE WORKPLACE

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.

Drug Free Work Week is being promoted for the week of October 14-20. The U. S. Department of Labor and its Drug Free Workplace Alliance are urging all employees and employers to take part.

A leading source for drug testing, Quest Diagnostics, Inc., has reported a decline in the percentage of workers testing positive for drug use. The number fell from 4.1 percent in 2005 to 3.8 percent in 2006. But much data points to a significant problem with drug abuse in our society. Not surprisingly the problem finds its way into the workplace. Approximately 75 per-cent of illicit drug users are employed full or part time.

A survey released in 2007 by the Substance Abuse and Mental Health Services Administration (SAMHSA) reported that in the preceding month, one out of every 12 full time workers in the U. S. used an illegal drug. The industries where employees reported the highest rates of illicit drug use were food service, at 17.8 percent and construction at 15.1 percent. Similarly, heavy alcohol use was reported by 17.8 percent of construction, mining, excavation and drilling workers and by 14.7 percent of maintenance and repair workers. This survey also found cause for concern with the wide misuse of prescription drugs.

The nations drug czar has stated that "employees who use drugs miss work more often, are less healthy and are more prone to harming themselves and others in the workplace."

Only 30 percent of the full-time workforce in the SAMHSA survey reported that their current employer conducted random drug testing. Almost a third of the respondents said that they would not take a job if they knew they would be tested.

OSHA doesn't have a standard requiring employers to have workplace drug and alcohol programs, nor is there such a standard on the current regulatory agenda. In some circumstances however, the general duty clause, Section 5(a)(1) of the OSH Act, may be used to cite an employer for hazards arising from substance abuse on the job. In the absence of a specific standard, a general duty clause citation may be issued when all of the

following conditions are met: (1) the employer failed to keep its workplace free of a hazard (2) the hazard was "recognized" individually by the employer or generally by its industry (3) the hazard was causing or was likely to cause death or serious physical harm and (4) there was a feasible means to eliminate or materially reduce the hazard.

OSHA's general duty clause citation in one such case charged that employees were exposed to hazards created by an operator driving a powered industrial truck around the jobsite while intoxicated. The citation went on to state that among other means, one possible correction would be to develop, implement and enforce an alcohol and drug prevention program with employee testing, daily observation, and monitoring of employees for signs of possible intoxication.

Through its interpretation letters, alliances and citations OSHA has demonstrated support for workplace drug and alcohol programs, to include reasonable drug testing. As noted on its website, the agency recognizes that impairment by drug or alcohol use can constitute an avoidable workplace hazard. Five components are identified as needed for a comprehensive drug-free program. They include a policy, supervisor training, employee education, employee assistance and drug testing. It is cautioned that such programs should be reasonable and take into account employee rights to privacy.OSHA standard 1910.1020 gives employees access to their own medical and exposure records. This could include drug testing results if they are maintained as part of the employee's medical program and records. The standard, 1910.1020, does not apply to voluntary employee assistance programs if maintained separately from the employer's medical program records.

EEO TIP: RECENT CHALLENGES TO EEOC'S CHARGE PROCEDURES

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.

Apparently, not all of the EEOC's procedural regulations and charge processing practices are a matter of settled law. Within the past several months both charging parties and employers have initiated court challenges to some of those procedures which hitherto have been taken for granted. For example, in at least three significant cases the following issues were raised as to the lawfulness of certain aspects of EEOC's charge processing procedures:

1. Whether the EEOC's preliminary "Intake Questionnaire," standing alone, is sufficient to constitute a Charge under the Age Discrimination In Employment Act (ADEA), (Holowecki, et v Federal Express (S. Ct., certiorari granted. 6/07)

2. Whether the EEOC can lawfully issue a Right To Sue Notice in less than the 180 day period called for under Title VII. (E. D. Mich., 5/07)

3. Whether the EEOC's "Presumption of Receipt" of a Right To Sue Notice within five (5) working days is a reasonable, valid policy to trigger the running of the statutory 90-Day period for filing a lawsuit under Title VII and the other statutes enforced by the EEOC. (Morgan v Potter, 5th Cir. 6/07)

Only the first of these challenged procedures, namely the "Intake Questionnaire," will be discussed in this issue of the *Employment Law Bulletin.* A discussion of the others will follow in later issues.

The Matter of the "Intake Questionnaire"

In June 2007 the Supreme Court granted certiorari in the case of *Holowecki, et al v. Federal Express Corporation*. One of the critical issues in the case was whether the plaintiff, Paul Holowecki, and the 11 other named plaintiff's had filed a timely charge under the ADEA. As a matter of fact, all of the plaintiffs had "piggy-backed" on the so called "charge" of Patricia Kennedy, one of the named plaintiffs, which in fact was only an Intake Questionnaire together with a verified (sworn) affidavit to the EEOC, all of which outlined the discrimination which was subsequently alleged in the underlying lawsuit.

Under normal circumstances the EEOC's Intake Questionnaire is basically a form which is completed by an EEOC Intake Investigator as an initial step in the charge process for the purpose of providing the EEOC with all necessary background information pertaining to the charge. The charge, itself, is usually completed and filed later. The EEOC Intake Investigator solicits the information in the questionnaire from the charging party. Among other questions, the questionnaire seeks information as to the name of the respondent, type of business, the job held by the charging party, the job duties and general information as to the nature of the perceived or alleged discrimination in question. While the Intake Questionnaire is usually completed by an EEOC Investigator, on occasion it may be completed by a Charging Party and sent to the EEOC by mail. In this case Patricia Kennedy's Intake Questionnaire, filed on December 3, 2001, was accompanied by a verified (sworn) affidavit by the Charging Party as to the truth of the allegations being made.

On April 30, 2002 , Holowecki and the other Plaintiffs, filed a lawsuit in the U. S. District Court for the Southern District of New York. In substance the complaint alleged that Federal Express had discriminated against the plaintiffs on the basis of age in its "best practices, pay, minimum acceptable standards and other discriminatory practices." That court dismissed the lawsuit without considering the merits of the allegations on the following grounds:

1. The EEOC Intake Questionnaire and Affidavit did not constitute an EEOC Charge and therefore the plaintiffs did not satisfy the ADEA requirement that a claimant file a charge with the EEOC before bringing a lawsuit, and

2. That although plaintiff, Patricia Kennedy, filed a regular charge on May 30, 2002, after the lawsuit had been filed on April 30, 2002, that charge was untimely because it had not been filed 60 days prior to filing the lawsuit in question, as required by the ADEA.

Another interesting quirk in this case is that Federal Express did not have an opportunity to conciliate the "charge," with the EEOC, nor did the EEOC investigate the case or issue a Right To Sue notice because such were not directly required under the ADEA. Under the ADEA a Plaintiff may file suit sixty (60) days after filing a charge, without more. [29 U.S.C. Section 626 (d) – (e)]

Notwithstanding the somewhat unusual processing of the charge, the Second Circuit reversed the holding of the district court stating as follows:

> "We disagree with the district court's dismissals of the plaintiffs' claims. Specifically we hold that the plaintiff Patricia Kennedy's Intake Questionnaire and accompanying verified affidavit…constituted an EEOC charge that satisfactorily fulfilled the ADEA's exhaustion requirements even though the EEOC never notified, or investigated the employer. Furthermore, we conclude that Kennedy's EEOC charge was

sufficient to permit the eleven named plaintiffs that never filed EEOC charges to take advantage of the single filing or piggybacking rule and thereby satisfy the ADEA's exhaustion requirements." (440 F.3d 558, *et seq*, March 2007)

In substance the Second Circuit reasoned that the Intake Questionnaire contained all of the statutory information that was required of a formal charge including a " manifest intent" for the EEOC to take action to stop the alleged discrimination. The manifest intent rule simply means that the charging party has clearly indicated an intent to invoke administrative action by the EEOC on the Intake Questionnaire filed with that agency.

EEO TIP: Apparently because of a diversity of opinion among six Federal Circuit Courts of Appeal which have addressed the issue of whether an Intake Questionnaire may constitute a charge, the Supreme Court has agreed to review this case. Currently, the Third and Sixth Circuits appear to hold that an Intake Questionnaire does not constitute a charge for purposes of the ADEA. The Second, Seventh, Eighth and Eleventh Circuits apparently allow an intake questionnaire to substitute for a charge under limited circumstances. **Incidentally, the Eleventh Circuit, like the Second Circuit applies the manifest intent rule in deciding whether to give an intake questionnaire the status of a charge.** (See *Wilkerson v Grinnell Corp*. 270 F.3d 1314, 1319 (11th Cir. 2001).

Please feel free to call the number indicated above if you have any questions or would like some legal assistance on any procedural matters pertaining to charges filed with the EEOC against your firm.

LMV UPCOMING EVENTS

October 11, 2007 – LMV and Lyons Pipes & Cook (Mobile) **The Effective Supervisor**

October 23, 2007 – (Auburn/Opelika) **The Effective Supervisor**

October 24, 2007 – (Montgomery) **The Effective Supervisor**

October 24, 2007 – LMV and Lyons Pipes & Cook (Mobile) **The Effective Supervisor**

November 7, 2007 – (Birmingham) **Affirmative Action Update**

November 7, 2007 – Webinar – **An Employer's Guide to the OSHA Inspection and Citation Process**

November 13, 2007 – (Huntsville) **Affirmative Action Update**

November 13, 2007 – Webinar – **Can I Get A Witness? How to Conduct Internal Investigations**

December 11, 2007 – Webinar – **Affirmative Action Basics**

December 12, 2007 – (Birmingham) **The Effective Supervisor**

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 "fragrance sensitivity" in the workplace is not a disability? *Robinson v. Morgan Stanley Dean Witter* (N.D. IL. August 31, 2007). The employee alleged that her reaction to fragrances at the workplace included shortness of breath, headache, stuffiness and fatigue. She argued that the employer should accommodate her by prohibiting fragrances at the workplace. In rejecting this claim, the court stated that the employee's condition was not a disability, as she not "substantially limited" in major life activities. The court explained that "though Robinson may be temporarily restricted in her ability to perform activities such as breathing and seeing when exposed to perfumes or fragrances because her throat may become constricted and eyes water…intermittent flare-ups do not establish that an impairment is a disability."

…that an employer failed to implement its arbitration program properly, thus employees may proceed with their Fair Labor Standards Act claim? *Moran v. Ceiling Fans Direct, Inc.*, (5th Cir. September 6, 2007). The employer, based in Texas, implemented a mandatory arbitration policy after some employees sued for violations of the Fair Labor Standards Act. The employer had a stack of material about the arbitration program which it invited employees to review. The notice also said that any employee returning to work after the meeting announcing the program had agreed to accept the program. The employer subsequently revised its handbook to include the arbitration program, but did not require that employees sign for it. The court, in applying Texas law, ruled that an employer in Texas may change the terms of the at will employment relationship. However, to do so, the employer must give "unequivocal" notice to the employee and prove that the employee accepted those changes in the employment terms. The employer failed to do this in how it implemented the mandatory arbitration program and, therefore, arbitration was not required.

…that the United Steelworkers on August 21, 2007 settled a claim filed by its members who were fined for crossing a picket line during the 2006 strike against Goodyear Tire and Rubber Company? The case involved employees who were union members and initially joined the strike in October 2006. However, one month later they resigned from the union and returned to work. The union filed charges against the individuals for crossing the picket line, conducted a trial and at the conclusion of the trial fined each employee $620. After they resigned and crossed the picket line, they allege that the union threatened them, sent hate mail and took other action to interfere with their rights. The settlement agreement requires the union to post a notice that it will not "harass and restrain" employees, threaten them or retaliate against them if they resign from the union.

…that a "neutrality" agreement signed between an employer and union may be subject to the bargaining agreement's grievance and arbitration procedure? *Steelworkers v. Hibbing Joint Venture* (D. MN. September 4, 2007). The neutrality agreement covered union efforts to organize the company's workforce at other locations. The agreement included permitting the union to have access to the employer's facilities to distribute literature and meet with employees. Due to the NLRB's current consideration of the legality of neutrality agreements, the employer refused to honor the neutrality agreement, stating that it was unlawful. According to the court, the union has the right to arbitrate whether the employer violated the neutrality agreement. If the union should win the arbitration and seek to enforce it, then it is appropriate for the court to consider whether such an agreement is legally permissible.

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