"Your Workplace Is Our Work"®

April 2008
Volume 16, Issue 4

Inside this Issue

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

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

Employment Law Bulletin

To Our Clients And Friends:

Employers often are tentative about withdrawing a conditional offer of employment when the employer obtains post-offer medical information of concern. The recent case of the *EEOC v. Lyondell-Citgo Refining* (S.D. Tx. April 9, 2008) is a useful review of employer rights to withdraw an offer for medical reasons from an otherwise qualified applicant.

The EEOC sued the employer on behalf of Steve Aleman, an applicant whose conditional offer was withdrawn. The job Aleman applied for required climbing ladders and stairs and descending towers at the company's refinery. At the pre-employment physical Aleman disclosed to the company doctor that he had a traumatic head injury 20 years earlier which caused a continuing weakness in his right arm and leg. Note that Aleman passed the physical ability test to do the job. The doctor found no continuing neurological damage or impairment, but concluded that Aleman's right side weakness had impaired his ability to climb ladders safely. Therefore, the company withdrew the offer.

In granting summary judgment for the employer, the court concluded that Aleman was not disabled under the ADA. A limited ability to climb is not considered a major life activity, ruled the court. The court also rejected the EEOC's argument that the employer perceived Aleman as substantially impaired. The court stated that "such insignificant impairments, if they existed as perceived, are insufficient to constitute substantial limitations" as required under the ADA.

The fact that someone may be limited in performing a job-related activity does not mean the limitation rises to the level of a substantial impairment, which is necessary for protection under the ADA. When as a result of a post offer physical exam or fitness for duty test there is a substantiated basis to conclude that the individual may not perform a key factor of the job due to a limitation, the employer may be able to withdraw the offer without violating the ADA. Most physical limitations are not substantial enough to qualify as a disability. Even if there is a substantial impairment of a major life activity, an employer ultimately may withdraw the offer if it follows the ADA's reasonable accommodation analysis and concludes that such accommodation is not possible.

WORKPLACE VIOLENCE LAWSUIT MAY BE PURSUED AGAINST EMPLOYER

An employee may pursue a negligence claim against the employer due to his injury from a workplace shooting by a fellow employee. *Medlen v. Estate of Meyers*, (6th Cir., April 9, 2008). Medlen was an employee at DaimlerChrysler in Toledo, Ohio, where he was shot by a fellow employee, Meyers, who then killed himself. Medlen sued Meyer's estate and the company. Medlen alleged that the company knew Meyers was potentially violent but did not take reasonable steps to prevent Meyers from injuring his co-workers. Medlen argued that he was required to work at a location where there were inadequate security measures. The company initially removed the case to federal court, arguing that because Medlen was covered under a collective bargaining agreement, the collective bargaining agreement preempted any state claim. The court rejected that argument and remanded the case to state court.

As employers cope with increased concerns about workplace violence, several states are considering laws to forbid employers from prohibiting employees from possessing a gun in their vehicle on company property. Too often, employers who observe employee behavior which they think may become violent believe that they are limited from acting by the threat of The Americans with Disabilities Act or potential invasion of privacy claims. To the contrary, **employers have broad rights and are charged with the responsibility to act if they believe that an employee may present a risk of harm to others. When faced with the risk of a claim from a potentially violent employee or the risk of violence, err on the side of what is necessary to protect the safety of the workforce.**

CONFERENCE BOARD WEIGHS IN ON OBESITY

The Surgeon General estimates that obesity costs our country more than $100 billion per year. Approximately one-third of American adults are obese, leading one late night comedian to comment that the new Boeing 787 Dreamliner aircraft seats 300 passengers, or 150 Americans. In the Conference Board's April 9th report, "Weights and Measures: What Employers Should Know About Obesity," the report estimates that obesity costs amount to 5 to 7% of all healthcare costs in the United States. Furthermore, "there are apparent indirect obesity costs from absenteeism and lower productivity."

The report emphasizes that mortality due to obesity is largely preventable and employers can have a significant impact on this outcome. According to one study, "financial incentives, if properly implemented, may successfully promote behavioral change among employees." **The report provides an example where an employer gave cash incentives to employees who maintained or lost and maintained their new weight, resulting in a savings of approximately 15% of its annual insurance costs.** Just as employers are offering health plans with reduced rates for non-tobacco users or employees or family members who are enrolled in a tobacco cessation program, employers should consider the same approach to address obesity. Other examples of actions employers can take include adding bottled water and diet drinks to vending machines, healthy choice options for snacks in vending machines, and providing discounts to health clubs. Although obesity usually does not qualify as a disability under the ADA (morbid obesity would qualify, which is considered twice what a person should weigh for their height, age and gender), medical conditions associated with obesity may qualify as disabilities.

GOSSIP IS UNPROTECTED WORKPLACE SPEECH

The case of *Barley v. Wal-Mart Stores* (N.D. OK., April 10, 2008) involved issues of alleged sexual harassment and the spreading of rumors regarding alleged sexual activity by employees. An employee complained about sexual harassment from a manager. The company's investigation concluded that not only were the allegations unsubstantiated, but also the person who made the claim spread rumors about the alleged behavior. The company had a policy that prohibited workplace harassment and also prohibited behavior that showed disrespect to other employees. The individual who brought the harassment complaint and others who repeated what the alleged victim said were all disciplined for gossiping about this behavior.

Because the alleged recipient of the behavior had other recent disciplinary incidents, the discipline for gossiping resulted in her termination. She alleged that she was terminated in retaliation for reporting sexual harassment. The court rejected that claim, stating that the employee "cannot raise a genuine issue of material fact by claiming that [the employer] was wrong about the facts, should have investigated further, mistakenly came to one conclusion over another, or made a poor or ill advised business decision." The employer was entitled to exercise its business judgment based upon a proper and complete investigation. The outcome of that judgment – discipline for workplace gossip – was not retaliation.

UAW MEMBERSHIP AT IT'S LOWEST SINCE 1941

The once-proud United Auto Workers lost 73,538 members last year to drop to 464,910 members, its lowest since 1941. It is not surprising that some refer to UAW as an acronym for "U Ain't Workin'." The highest level of membership in the UAW was in 1979, when 1,527,858 employees belonged.

UAW membership will drop further as Ford, GM, and Chrysler continue to reduce their workforces. Furthermore, the UAW has been unsuccessful in its organizing efforts directed toward foreign auto manufacturers in the U.S. and their suppliers. Overall, the UAW has $1.27 billion in assets and has committed $110 million to organizing efforts. Seeking members outside of the auto industry, the UAW successfully organized card dealers at casinos in Atlantic City, Detroit and at an Indian reservation in Connecticut. They have also initiated organizing efforts in healthcare, where unions win approximately 72% of all elections, the highest win rate in any business sector.

OSHA TIP: OSHA'S NEW NATIONAL EMPHASIS PROGRAMS

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.

In recent weeks OSHA has announced National Emphasis Programs (NEPs) targeting two hazards for a focus of inspections and outreach efforts.

The first of these involves **crystalline silica** and builds upon a Special Emphasis (SEP) initiated in 1996 that was directed toward reducing employee exposures. The new program is CPL 03-00-007 and has an effective date of January 24, 2008. In announcing the program, OSHA notes that two million workers each year are threatened by exposure to silica with the risk of developing silicosis. Silicosis is a disabling, nonreversible and sometimes fatal lung disease. The National Institute of

Occupational Safety and Health (NIOSH) reports that over 250 workers die each year from silicosis.

OSHA has had silica on its list of hazards since its inception and has issued many citations for overexposures. The agency has used its inspection data to identify industries with potential exposures to crystalline silica. Processes historically associated with high rates of silicosis include sandblasting, sand-casting and foundry operations. Over 40 Standard Industrial Classifications (SICs) or North American Classification System (NAICS) are identified as having documented employee exposures to silica.

This NEP calls for the following actions:

- Follow-up inspections where employers have been cited for overexposures to silica.
- Each OSHA region is to target at least two percent of its total inspections to silica-related hazards in a range of facilities reflective of the distribution of general industry and construction sites within their region.
- Each OSHA field office is required to have a local emphasis program (LEP) for crystalline silica.

A second NEP, addressing the hazard of **combustible dust**, was issued by OSHA directive CPL 02-00-008 with an effective date of 3/11/08. This was a reissue of an earlier version of the NEP issued on 10/18/07. These directives set out the policies and procedures regarding the inspection of facilities that handle combustible dust. In its release of the latter directive OSHA states that a recent catastrophic dust explosion at a sugar refinery prompted the agency's intensified focus on this hazard.

Dusts of concern include, among others, metal, wood, plastic, organic (sugar, soap, paper, dried blood), and certain textile dusts. These combustible dust hazards may be found in agricultural, chemical, textile, wood products, wastewater treatment, metal processing, and recycling industries. In an appendix to the directive, 2 lists are provided of SICs/NAICS identifying industries with more frequent and/or high consequence dust explosions and of those industries with the potential for such explosions. Over 60 industrial classifications are included in the lists indicating a need to be aware of combustible dust hazards.

This NEP directs each OSHA office to conduct at least 4 inspections each year of sites identified as having the potential for combustible dust hazards.

Employers should know that if their work activities involve those described above, that create possible crystalline silica or combustible dust hazards, they may be targeted for an OSHA inspection.

EEO TIP: WHAT THE EEOC HAS BEEN UP TO DURING THE LAST MONTH

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

An Update in ADEA Regulations The EEOC has submitted notice of a proposed "rulemaking" change in the EEOC's Regulations pertaining to the ADEA. In substance, the new rule would harmonize the Commission's regulations with the Supreme Court's holding in the case of *Smith v City of Jackson*, 125 S. Ct. 1536 which was decided on March 30, 2005.

In that case the Petitioners, a number of city law enforcement officers or public safety officers, alleged that the city's revised pay plan under which officers with less than five years of

service received proportionately greater raises than those with more seniority (most officers over 40 had more than five years of service) violated the ADEA because the plan had an disparate impact on them. The District Court granted summary judgment to the city and the Fifth Circuit affirmed holding that "disparate-impact claims are categorically unavailable under the ADEA," but it assumed that the Petitioners would be entitled to relief under *Griggs v Duke Power*, 91 S. Ct. 849 because of the parity in the language of the ADEA to Title VII.

The Supreme Court however found that the ADEA does authorize recovery in disparate impact cases except that the bases for recovery is much narrower because of the ADEA's provision which allows for a differentiation "based on reasonable factors other than age" (RFOA). Thus, while the Supreme Court expressly overruled the Fifth Circuit on the issue of the availability of a disparate impact claim, it nonetheless affirmed its judgment of dismissal because the Petitioners had not set forth a valid disparate-impact claim.

In writing for the majority in the *Smith* case, Justice Stevens also found that when Congress passed the Civil Rights Act of 1991, which amended Title VII in order to modify the Supreme Court's ruling in *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115, which held that in order to find liability in a disparate impact case under Title VII, the Plaintiffs must identify the "specific test, requirement or practice" that has an adverse impact on the protected group in question, no similar amendment was made to Section 4 (f)(1) the ADEA. Consequently, the requirement that a plaintiff must also identify the specific test, requirement or practice which caused the disparate impact still stands under the ADEA. The EEOC's Regulations already contain provisions pertaining to "differentiations, based on reasonable factors other than age." **The proposed "rule change" is intended to address the requirement of specificity in identifying the test, requirement or practice which has caused the disparate impact on persons within the protected age group. Specifically, the proposed new regulation, to be found at 29 C.F.R. 1625.7(d), would include language which states in substance that an employment practice which has a disparate impact on persons within the protected age group is discriminatory under the ADEA unless:**

> "…the practice is justified by a reasonable factor other than age. An individual challenging the allegedly unlawful practice is responsible for isolating and identifying the specific employment practice that is allegedly responsible for any observed statistical disparities."

The proposed new regulation drops the provision in the current regulation which states in substance that when an employer claims that a test or practice which has a disparate impact on protected group members is based upon "..a factor other than age, it can only be justified as a business necessity." The Supreme Court in the *Smith* case specifically found that the RFOA test, not a test of business necessity, was appropriate in disparate impact cases under the ADEA.

At this point it is not clear as to when and in what final form the proposed new regulation will be approved. Comments can be mailed to EEOC's Executive Secretariat at 1801 L. Street, N. W., Washington, DC 20507. However, this column will alert our readers as to any final developments.

Alabama Attorney Nominated To Fill EEOC Vacancy Constance S. Barker, an attorney with Capell & Howard in Montgomery, Alabama is expected to be nominated by President Bush to fill a vacancy on the Equal Employment Opportunity Commission which has existed

since Naomi Earp was selected as the Chair of the Commission almost two years ago. Normally, Commissioners serve five-year terms, but in this instance Ms. Barker is being nominated to serve out the remainder of Ms. Earp's term which would end in 2011. Ms. Barker received her undergraduate degree from Notre Dame University and her law degree from the University of Alabama School of Law. While, generally, she has specialized in management matters, Ms. Barker apparently has also defended various state departments and agencies in discrimination matters including a number of significant class actions. If confirmed by the Senate, Ms. Barker will serve with Naomi Earp and Leslie E. Silverman, the Republican Commissioners, and with Stuart J. Ishimaru and Christine M. Griffin, the Democrat Commissioners. Upon Ms. Barker's confirmation, the Equal Employment Opportunity Commission will be comprised of four females and one male. That kind of a makeup in terms of gender has not made a significant difference in the Commission's approach to employment problems in the past and the addition of Ms. Barker would not be expected to change that.

If you have any questions on employment matters please feel free to call this office at (205) 323-9267.

WAGE AND HOUR TIP: DEDUCTIONS FROM EMPLOYEE'S PAY

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.

Employees must receive at least the minimum wage free and clear of any deductions except those required by law or payments to a third party that are directed by the employee. Not only can the employer not make the prohibited deductions he **cannot require or allow** the employee to pay the money in cash apart from the payroll system.

Examples of deductions that can be made:

- Deductions for taxes or tax liens.
- Deductions for employee portion of health insurance premiums.
- Employer's actual cost of meals and/or housing furnished the employee.
- Loan payments to third parties that are directed by the employee.
- An employee payment to savings plans such as 401k, U. S. Savings Bonds, IRAs & etc.
- Court ordered child support or other garnishments provided they comply with the Consumer Credit Protection Act.

Examples of deductions that cannot be made if they reduce the employee below the minimum wage.

- Cost of uniforms that are required by the employer or the nature of the job.
- Cash register, inventory shortages, tipped employees cannot be required to pay the check of customers who walk out without paying their bills.
- Cost of licenses.
- Any portion of tips received by employees other than tip pooling plan.
- Tools or equipment necessary to perform the job.
- Employer required physical examinations.
- Cost of tuition for employer required training.
- Cost of damages to employer equipment such as wrecking employer's vehicle.
- Disciplinary deductions. Employees being paid on a salary basis may not be deducted if they work any part of week except for employees that are

considered as exempt may docked for "major safety infractions."

If an employee receives more than the minimum wage, in non-overtime weeks the employer may reduce the employee to the minimum wage. For example an employee who is paid $7.00 per hour may be deducted $1.15 per hour for up to the actual hours worked in a week the employee does not work more than 40 hours. Also, Wage and Hour takes the position no deductions may be made in overtime weeks unless there is a prior agreement with the employee. Thus, employers might want to consider having a written employment agreement allowing for such deductions in overtime weeks.

The Act provides that Wage and Hour may assess, in addition to requiring the payment of back wages, a Civil Money Penalty of up to $1100 per employee for repeated and/or willful violations of the Fair Labor Standards Act. Thus, employers should be very careful to ensure that any deductions are permissible prior to making such deductions. If you have any further questions, I can be reached at (205) 323-9272.

LMV 2008 UPCOMING EVENTS

ALABAMA DESK MANUAL CONFERENCE
Birmingham – June 12-13, 2008
Cahaba Grand Conference Center

AFFIRMATIVE ACTION UPDATES
Birmingham – December 9, 2008
Bruno Conference Center
Huntsville – December 11, 2008
Holiday Inn Express

BANKING/FINANCE/INSURANCE BRIEFING
Birmingham – September 18, 2008
Bruno Conference Center

EFFECTIVE SUPERVISOR®
Tuscaloosa-May 15, 2008
Bryant Conference Center
Huntsville-October 2, 2008
Holiday Inn Express
Birmingham-October 8, 2008
Cahaba Grand Conference Center
Muscle Shoals-October 16, 2008
Marriott Shoals
Mobile-October 22, 2008
Ashbury Hotel
Auburn/Opelika-October 30, 2008
Hilton Garden Inn

HEALTHCARE BRIEFING
Birmingham – June 19, 2008
Bruno Conference Center

RETAIL/SERVICE/HOSPITALITY BRIEFING
Birmingham – August 5, 2008
Vulcan Park

WAGE AND HOUR REVIEW
Birmingham – December 10, 2008
Vulcan Park

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 25% of U.S. workers are afraid that they will lose their jobs? This is according to a report that was released on April 9, 2008 by the Pugh Research Center. The report defines middle class as those earning between $45,000 and $90,000 annually. Approximately 25% of those employees are afraid they will lose their jobs; 35% of those earning less than $45,000 are afraid they will lose their jobs and 12% of those earning more than $90,000 are afraid they will lose their jobs. Eighty percent of those

in the middle class say that it is more difficult now to maintain their standard of living.

…that legislation was introduced on April 15, 2008 which would reduce the number of individuals throughout the country who are classified as independent contractors? Known as the Taxpayer Responsibility, Accountability, and Consistency Act, it would narrow the definition of who is an independent contractor and provide that an individual may petition the IRS to review his or her status as an independent contractor. The bill would include fines for those employers who misclassify individuals as independent contractors. According to the IRS, approximately 3.4 million individuals are misclassified as independent contractors and should be compensated as employees.

…that on April 3, 2008, a fast food franchisee agreed to a $505,000 consent decree based upon sexual harassment directed toward four of its teenage employees? The employees were ages 15 to 19 and all female. They alleged that their male supervisor made sexually offensive remarks and repeatedly touched them on their breasts and buttocks. The settlement includes the company agreeing to revise its discrimination and harassment policies, distribute those policies to all employees annually and to every new employee and include within the policies a procedure to raise complaints about harassment or discrimination. Furthermore, managers will receive comprehensive training as part of the consent decree.

…that $5.9 million in punitive damages were awarded against Kelly Services in a religious discrimination case? *Noyes v. Kelly Services*, (E.D. Cal., April 4, 2008). Noyes alleged that she was not promoted because unlike her manager and several other employees at her branch location, she was not a member of the Fellowship of Friends,. She was able to show that there was a pattern of favoritism toward those employees who were part of the Fellowship of Friends. She claimed that in addition to the denial of a promotion, she was turned down for three other positions in favor of less qualified employees, all of whom were Fellowship members. She raised an internal complaint about the behavior, but the employer decided that it could not take action because it did not believe it had the right to ask employees about their religious affiliations as part of its investigation (Editorial comment from LMV: That's absolutely incorrect).