LEHR MIDDLEBROOKS
& VREELAND, P.C.

Employment Law Bulletin

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Your Workplace Is Our Work®

Inside this issue:

EEOC to Employers: Train Your Supervisors!

"We continue to see at the EEOC a failure of companies to train their supervisors in what actions or omissions can expose the company to liability," stated EEOC Regional Attorney William R. Tamayo. He added that often supervisors and managers do not know the principles regarding equal employment opportunity, harassment and retaliation, nor are they knowledgeable about the company's policies in these areas. In essence, the EEOC, juries, and judges consider employers negligent if they place a person in a supervisory or managerial responsibility and without training in these critical areas.

Our full day Effective Supervisor® program is an outstanding opportunity for supervisors and managers to learn their rights and responsibilities, "lawful leadership" and hiring, retention, and discharge strategies. We have scheduled our Effective Supervisor Program at five (5) locations in October.

Huntsville	October 2
Birmingham	October 8
Muscle Shoals	October 16
Mobile	October 22
Auburn/Opelika	October 30

Click here for additional information about the locations, program, and registration. We also provide "in-house" Effective Supervisor® programs.

Ineligible Under FMLA: Eligible Under Employer Policy

In the case of Peters v. Gilead Sciences, Inc. (7th Cir. July 14, 2008), the employer was surprised to find out that its improper FMLA policy may have created rights for an employee who otherwise would have been ineligible. In the Employee Handbook, the company stated that employees would receive 12 weeks of Family and Medical Leave if they had worked at least 1,250 hours during the previous 12 months and if they had been employed for one year. So far, so good. Due to an injury, Peters requested FMLA leave for 11 days. The company wrote Peters a letter telling him that he was entitled to leave if he had worked at least 1,250 hours during the previous 12 months and that he would be reinstated to the same or an equivalent position if he returned to work within 12 weeks. This letter contained the same language as the company's FMLA policy in its Employee Handbook.

FROM OUR EMPLOYER RIGHTS SEMINAR SERIES:

Retail/Service/Hospitality Briefing

Vulcan Park
Birmingham, AL
September 16, 2008, 9:00 am-12:30 pm
Sponsored by:
Lehr Middlebrooks & Vreeland

Banking, Insurance & Finance Industry Update

Bruno Conference Center
Birmingham, AL
Sept. 18, 2008, 9:00 am -12:30 pm
Presented by: LMV Attorneys

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Peters returned to work and took another leave three months later. The employer sent Peters another letter notifying him of his FMLA rights. While on leave, the company decided to replace Peters. Peters notified the company on April 16 that he could return to work on May 5, but the company's replacement began work on April 28. The company notified Peters that he was a key employee who did not have to be reinstated under the FMLA. Peters sued, claiming that the company breached its obligationsto him under the FMLA. The company replied that because it did not meet the jurisdictional requirement of 50 employees working within a 75-mile radius, Peters was not entitled to any FMLA coverage. In reversing the District Court's Summary Judgment decision for the employer, the Court of Appeals stated that **"there is no reason that employers cannot offer FMLA-like leave benefits using eligibility requirements less restrictive than those in the FMLA…Peters' statutory ineligibility is irrelevant to the contract-based theories of liability."** Thus, the Court concluded that the company's policy and its letters to Peters may be contractual in nature, and thus binding. The Court remanded the case for the District Court to consider.

This case is a reminder for employers to be sure (1) their FMLA policy is complete and (2) if employers provide FMLA for non-qualifying employees, employers may have extended "contract" rights to these employees who otherwise were ineligible for FMLA protection.

Confidentiality and No Loitering Policies Unlawful, Rules NLRB

Employers often have policies stating that employees are prohibited from discussing their compensation with other employees. There has always been the potential issue of how that would relate to an employee's rights under Section 7 of the National Labor Relations Act. Section 7 gives the employees the right to act in concert regarding wages, hours and conditions of employment. Discussing wages with other employees may be covered by Section 7 and in the case of the NLS Group, the NLRB concluded that the employer's prohibition of such discussion was illegal.

The employer, a temporary employment agency, required applicants to sign the following: "Employee also understands that the terms of this employment, including compensation, are confidential to Employee and the NLS Group. Disclosure of these terms to other parties may constitute grounds for dismissal." The Administrative Law Judge ruled in favor of the employer, but the NLRB ruled that employees could interpret that to prohibit discussing those terms with a potential union representative. Thus, such a prohibition violated employees' Section 7 rights. In Tecumsah Packaging Solutions, Inc., the Administrative Law Judge ruled that the employer's no loitering policy was permissible under the National Labor Relations Act. The judge thought that it was reasonable for the employer to have the right to prohibit loitering on its own property. However, the NLRB ruled that employees could interpret the policy as prohibiting them from discussing Section 7 activities on employer premises at the end of their workday.

No loitering and no discussion of pay policies are not per se illegal. However, they must be crafted carefully so the assertion of employer rights does not violate employee Section 7 rights.

EEO Tips: EEOC Investigators Get New Instructions on Religious Discrimination

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 the states of Alabama and Mississippi. Mr. Rose can be reached at 205.323.9267.

On July 23, 2008 the EEOC updated its Compliance Manual instructions to EEOC Investigators on religious discrimination. The new instructions are comprehensive and are intended to replace Section 628 of the Compliance Manual and a number of other policy statements, which had been issued over the last twenty years. However, the new instructions on religious discrimination in the Compliance Manual do not affect the Commission's Procedural Regulations on

Religious Discrimination found at 29 C. F. R. 1605; they will remain the same.

According to the EEOC, the updated instructions to EEOC investigators are necessary because of increased pluralism in the workplace. Mainly because of the increased immigration of Muslims, Hindus, Buddhists and other groups, employers now face religious accommodations beyond those worked out for the more traditional religions such as Christianity and Judaism. For example, in addition to accommodations pertaining to the wearing of crosses, yarmulkes and providing time off for religious observances, employers now frequently may need to accommodate the wearing of beards, hijabs, or other religiously significant attire as well as facilities for prayer or meditation.

While the actual number of religious discrimination charges filed with the EEOC in fiscal year 2007 was 2,880, (3.5% of all charges filed), this is double the amount 15 years ago. The allegations in those charges with respect to requested accommodations varied considerably, as alluded to above. The EEOC suggested approaches for handling this recent religious diversity in the workplace and the accommodations and other related problems addressed are intended not only for EEOC investigators but also for employers, employment agencies and unions.

The general provisions of Title VII pertaining to religion, remain the same: Religion is very broadly defined under Title VII to "include all aspects of religious observance and practice as well as belief." Courts have held that:

Religious beliefs, practices, and observances include those that are theistic in nature, as well as non-theistic "moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views." Religious beliefs can include unique views held by a few or even one individual. However, mere personal preferences are not religious beliefs. Title VII requires employers to accommodate religious beliefs, practices, and observances if the beliefs are "sincerely held" and the reasonable accommodation would not create an undue hardship on the employer.

The EEOC and various courts have held that "social, political or economic philosophies, as well as mere personal preferences, are not "religious" beliefs protected by Title VII. One of the major challenges that an employer faces is determining whether a given practice is for religious reasons or is merely secular. For example one employee may wear certain religious garb for religious reasons while another wears the same garb purely for personal reasons. Or one employee may impose dietary restrictions on himself for religious reasons while another does so for purely secular reasons. Thus, an employer must often make a case-by-case determination as to the motives of the employee in question, not merely the employee's actions, themselves.

The EEOC's updated instructions do not contain a "cookie-cutter" solution to all such problems but they do suggest some "best practices" that an employer can follow in making decisions as to whether a reasonable accommodation can or should be made. The following are some of the EEOC's suggested approaches:

- Employers should train managers and supervisors on how to recognize religious accommodation requests from employees. Employers should inform employees that they will make reasonable efforts to accommodate the employee's religious practices.

- Employers and employees should confer fully and promptly to the extent needed to share any necessary information about the employee's religious needs and the available accommodation options.

- Employers should individually assess each request and avoid assumptions or stereotypes about what constitutes a religious belief or practice or what type of accommodation is appropriate.

- An employer is not required to provide an employee's preferred accommodation if there is more than one effective alternative to choose from. An employer should, however, consider the employee's proposed method of accommodation, and if it is denied, explain to the employee why his proposed accommodation is not being granted.

- When faced with a request for a religious accommodation, which cannot be promptly implemented, an employer should consider offering

alternative methods of accommodation on a temporary basis while a permanent accommodation is being explored. In this situation, an employer should also keep the employee apprised of the status of the employer's efforts to implement a permanent accommodation.

- Managers and supervisors should also be trained to consider alternative available accommodations if the particular accommodation requested would pose an undue hardship.

As to the matter of undue hardship, the EEOC recommends the following "Best Practices" by employers in deciding how to approach that issue:

- Employers should train managers to be aware that if the requested accommodation would violate a collective bargaining agreement (CBA) or seniority system, they should confer with the employee to determine if an alternative accommodation is available.

- An employer should not assume that an accommodation will conflict with the terms of a CBA or seniority system without first checking to see if there are any exceptions for religious accommodation or other avenues to allow accommodation consistent with the seniority system or CBA.

- An employer should not automatically reject a request for religious accommodation just because the accommodation will interfere with the existing seniority system or the terms of a CBA. Although an employer may not upset any co-workers' settled expectations, an employer is free to seek a voluntary modification to a CBA in order to accommodate an employee's religious needs.

- Employers should ensure that managers are aware that reasonable accommodation may require making exceptions to policies or procedures, where it would not infringe on other employees' legitimate expectations.

- The *de minimis* undue hardship standard refers to the legal requirement. As with all aspects of employee relations, employers can go beyond the requirements of the law and should be flexible in evaluating whether or not an accommodation is feasible.

The writer of this column has some misgivings about the EEOC's suggested approaches or so- called "Best Practices" which would have the employer attempt to modify, circumvent or otherwise avoid the provisions of a CBA or seniority system in order provide a religious accommodation. First of all in my judgment any attempt to do so, would require "more than a de minimus" in terms of cost because of the number of administrative changes that would have to be made. And, secondly, it might engender hard feelings by other employees if it opens the door for other employees who profess the same religion to obtain the same accommodation. Accordingly, it is suggested that employers should use great caution in trying to utilize any of these approaches in trying to find a reasonable accommodation

If you have any questions or need legal assistance in determining how to provide a religious accommodation that is both reasonable and effective, please call this office at (205) 323-9267.

OSHA Tips: Beating The Heat at Work

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.

It's the hot season and you can be sure that this is triggering complaints in many workplaces about the insufferable heat. OSHA offices will be getting the annual influx of reports from employees about their work in extreme temperatures. While some of these may involve only a thermostat setting or an inefficient a/c system, others may pose serious hazards. Accounts of heat-related illnesses and deaths offer ample evidence that this can be more than a mere comfort issue.

According to the Center for Disease Control, 8,015 deaths in the United States were caused by excessive heat exposure during the period of 1979-2003. This would mean more deaths were due to heat than hurricanes, lightning, tornadoes, floods and earthquakes combined. In 2005 the Bureau of Labor Statistics attributed 47 worker deaths and over two thousand nonfatal illnesses to environmental heat.

In addition to the "heat illnesses" there can be other consequences from environmental heat. The National Institute of Occupational Safety and Health (NIOSH) notes that heat tends to promote accidents due to slipperiness of sweaty palms, dizziness, or fogging of safety glasses. NIOSH further suggests that hot environments may contribute to the frequency of accidents. "One reason is that working in a hot environment lowers the mental alertness and physical performance of an individual. Increased body temperature and physical discomfort promote irritability, anger, and other emotional states which sometimes cause workers to overlook safety procedures or to divert attention from hazardous tasks."

OSHA has no specific standards pertaining to work in extreme temperatures. The agency can, and does when appropriate, issue citations for violations of the general duty clause of the OSH Act to address such conditions. To do so they must show that there is a serious hazard that was known or should have been known to the employer and that there is a feasible means to correct or mitigate the hazard.

An example of OSHA's use of the above includes a case where an employee working as a framer on a construction site was exposed to high environmental temperatures which resulted in his death from heat stress/hyperthermia..

An inspection in another case found employees sorting goods in a variety store with a 96 degree temperature in a metal building with no air conditioning and high humidity. Employees were found to be experiencing symptoms of heat exhaustion. A citation for violation of the general duty clause was alleged.

Another OSHA inspection resulting in a citation found employees working in the dye house of a textile finishing mill exposed to high temperatures with the potential for

heat stress conditions. Wet bulb globe temperature (WBGT) readings exceeded the screening criteria for Heat Stress Exposure published by the American Conference of Governmental Industrial Hygienists, 2005 edition.

Finally, an inspection of the kitchen area of a golf club found the cooks exposed to heat stress conditions and the employer was cited.

To abate violations alleged in the above examples, or to avoid citations for similar work situations, employers should consider implementing measures such as: (1) monitoring predicted weather conditions (2) ensuring adequate fluid replenishment (3) providing and requiring periodic breaks in a cool area (4) training employees and supervisors in the recognition, prevention, and treatment of heat illnesses and employee temperature monitoring (5) having an acclimation program for new employees and employees returning to work from absences of three or more days (6) setting specific procedures to be followed for heat-related emergency situations (7) providing that first-aid be immediately administered to employees with symptoms of heat-related illness.

For more information about heat-related illnesses and OSHA go to www.osha.gov and click on "Safety and Health Topics."

Wage and Hour Tips: Minimum Wage Increase

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 I am sure that most of you are aware the minimum wage increased to $6.55 per hour on July 24, 2008 with

another scheduled increase to $7.25 per hour on July 24, 2009. In addition six states have increased their minimum wage this month.

Illinois	$7.75 effective 7/1/08
Kentucky	$6.55 effective 7/1/08
Michigan	$7.40 effective 7/1/08
Nevada	$5.85 effective 7/1/08 for employers who provide health insurance
	$6.85 effective 7/1/08 for employers who do not provide insurance
Pennsylvania	$7.15 effective 7/1/08
West Virginia	$7.25 effective 7/1/08

The Connecticut legislature recently overturned the governor's veto and enacted an $8.00 per hour minimum wage to be effective January 1, 2009.

Who are employees?

The Fair Labor Standards Act defines employ as "suffer or permit to work" and the courts have made it clear that the employment relationship under the FLSA is broader than the traditional common law concept. **Mere knowledge, by an employer, of work done for him by another is sufficient to create the employment relationship under the FLSA.** Many employers attempt to treat all persons other than full time employees as independent contractors. However, to do so can be very costly.

The U.S. Supreme Court has on a number of occasions indicated that there is no single rule or test for determining whether an individual is an independent contractor or an employee for purposes of the FLSA. The Court has held that it is the total activity or situation which controls. Among the factors which the Court has considered significant are:

1. The extent to which the services rendered are an integral part of the principal's business.

2. The permanency of the relationship.

3. The amount of the alleged contractor's investment in facilities and equipment.

4. The nature and degree of control by the principal.

5. The alleged contractor's opportunities for profit and loss.

6. The amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent contractor.

7. The degree of independent business organization and operation.

There are certain factors which are immaterial in determining whether there is an employment relationship. Factors such as the place where work is performed, the absence of a formal employment agreement, or whether an alleged independent contractor is licensed by State/local government are not considered to have a bearing on determinations as to whether there is an employment relationship. The Court has said that the time or mode of pay does not control the employees' status.

There are several areas that have caused employers problems:

- The use of so-called independent contractors in the construction industry.
- Franchise arrangements, depending on the level of control the franchisor has over the franchisee.
- Volunteers - A person may not volunteer his/her services to the employer to perform the same type of service performed by an employee of the organization.
- Trainees or students.
- People who perform work at home.

The courts have addressed the issue numerous times. Listed below are examples of some of the rulings:

Instances where workers were found to be an independent contractor:

1. Cable television installers performing services for a company whose sole service was cable installation. The employing company had no control over the manner in which the installers executed their assignments, the hours they worked, the job performed, or the assistants they hired. Moreover, the installers' opportunity for profit/loss was independent of the employing company.

2. Individual working for a computer business after he moved from Hawaii to California and whose status changed from salaried employee to hourly consultant. No regularly scheduled contact between the employing business and the individual existed and, the employing business did not dictate the hours worked or the tasks performed. Also, work was distributed on an as-needed basis, and the individual was free to seek other employment.

3. Individuals who distributed telephone-number research to homeworkers who performed the telephone research. The employer exercised little control over the distributor's delivery of the cards, the distributors maintained their own records, the distributors risked financial loss and invested in their business and needed to possess managerial skills.

4. Welders who worked for a gas pipeline construction company on a project-by-project basis. The welders were highly skilled, supplied their own equipment, and the employing entity had no control over the methods or details of the welding work.

Instances in which individuals were found to be employees:

1. A hotel parking lot valet whose compensation was restricted to tips from hotel guests and a maximum 50 cents gratuity per parked vehicle. The valets' duties included loading and unloading luggage of hotel guests and keeping the hotel entrance clean. Furthermore, the valet wore a hotel-supplied uniform, was covered by the hotel's employee accident insurance, procured a police identification at the hotel's behest and expense, and received other employee privileges.

2. Cake decorators working at a bakery/retail store who supplied cakes for the bakery's retail outlets. The court noted that the decorators were dependent on the business to which they supplied their services, were regimented with respect to the time, place, quality, and manner in which they executed their assignments, possessed no control over profits, did not share in the success of the business and could not experience business loss. Moreover, as the court pointed out, the decorators were not required to possess specialized skills or prior experience and that their work was integral to the overall business.

3. Nightclub dancers. The court acknowledged the impermanent relationship of the dancers with the club; however, the court focused on the degree of control the club exerted. The club approved costumes, set the rates for certain dancers, and determined the dancer's work schedule. In addition, the club was found to have an extreme degree of control over the dancers' opportunity for profits because the club controlled the advertising, location, business hours, maintenance of facilities, and food and beverages. The court highlighted that a dancer's initiative was restricted to decisions involving costumes and dance routines, and her investment was limited to costumes and a padlock.

4. Waiters and waitresses. The reviewing tribunal highlighted that the waiters and waitresses could only work when the restaurant was open. Moreover, the waiters and waitresses did not invest in the restaurant or share in profits or losses.

5. Unskilled packers and peelers in employer's seafood operation, notwithstanding the fact that these individuals moved from plant to plant. The court expressed that the freedom to move did not deprive the unskilled laborers of the FLSA's protections in the absence of specialized and widely demanded skills.

In order to limit liability, an employer should look very closely at individuals that it considers to be independent contractors to make sure to avoid a potential liability. If you have additional questions do not hesitate to contact me.

2008 Upcoming Events

RETAIL/SERVICE/HOSPITALITY BRIEFING

Birmingham – September 16, 2008
Vulcan Park

BANKING/FINANCE/INSURANCE BRIEFING

Birmingham – September 18, 2008
Bruno Conference Center

EFFECTIVE SUPERVISOR®

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

AFFIRMATIVE ACTION UPDATES

Birmingham – December 9, 2008
Bruno Conference Center

Huntsville – December 11, 2008
Holiday Inn Express

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 Edi Heavner at 205.323.9263 or eheavner@lehrmiddlebrooks.com.

Did You Know…

…that anxiety caused by an employer's wrongful denial of FMLA constituted a serious health condition under the FMLA? *Farrell v. Tri-County* (June 27, 2008). The employee had asked for several shifts off for FMLA-related reasons, which was denied. As a result, the employee was diagnosed with anxiety and depression, resulting in more missed days of work. The employee was awarded $1,110.00 by a jury for the days he missed, as a consequence of the employer's violation.

…that infertility treatments are not gender neutral and an employee terminated for such treatments has a sex discrimination claim under Title VII? *Hall v. Nalco.* (7th Cir. July 16, 2008). The lower court dismissed the claim, holding that infertility affects men and women. This case involved an employee who was receiving in vitro fertilization, a treatment for women, only. According to the court, "contrary to the District Court's conclusion, Hall was terminated not for the gender-neutral condition of infertility, but rather for the gender-specific quality of child bearing capacity." The Court added that "because an adverse employment action based on child bearing capacity will always result in treatment of a person in a manner which but for that person's sex would be different, Hall's allegations present a cognizable claim of sex discrimination under Title VII."

…that an employee who was unable to work overtime did not qualify as disabled under the Americans with Disabilities Act? *Tjernagel v. Gates Corporation* (8th Cir. July 9, 2008). The employee told the HR Manager that she had multiple sclerosis. Her doctor placed her on restrictions, which included not working overtime. Overtime was required in approximately half of all work weeks. In denying her claim, the Court said "an employer's mandatory overtime requirement has been recognized as an essential function. When Tjernagel's restriction barred overtime, she was unable to perform an essential requirement of her job, being in attendance at work when needed, thereby rendering her unqualified for ADA protection."

…that an employee harassed due to an interracial relationship has a valid racial harassment and retaliation claim under Title VII? *Frazier v. Tennessee Department of Corrections* (M.D. TN July 14, 2008). The case

involved a white employee, Frazier, who was married to an African American. Another white employee made racial comments to Frazier, such as referring to her husband as “boy” and asking if her husband “picked cotton and fed hogs.” Although the comments to Frazier occurred only twice, it was severe enough for the case to go to trial for a jury to hear. The employer concluded in its investigation that although Frazier was “teased,” the teasing was not based on race.

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