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When Does ADA Require Assignment to a Vacant Position?

An issue of developing focus involves employer approaches to accommodate an employee by assigning the employee to a vacant position. The EEOC's position is that if an employee is "qualified" for a vacant position, then reasonable accommodation usually requires transferring the employee to that position. However, in the case of *EEOC v United Airlines, Inc.* (7th Cir. March 7, 2012), the court said that where job vacancies are filled on a "competitive" basis, a "qualified" employee with a disability does not have to receive priority over a better-qualified candidate. In rendering its opinion, the court said it was following the precedent of its Circuit, but did not necessarily agree with it. Federal appeals courts are split on the issue of whether being minimally "qualified" is enough to transfer the employee, or whether the employer may place a better-qualified employee in the position.

The EEOC sued United Airlines over its policy of how qualified individuals with disabilities were considered for vacant positions. United's policy provided that vacancies were awarded on a competitive basis. A candidate who was qualified would be considered, but the position was filled by the "best-qualified" candidate. The EEOC claimed that United's "best-qualified" candidate policy was a violation of the reasonable accommodation requirements under the ADA, which include transferring an employee to a vacant position. Although the Seventh Circuit upheld United's competitive policy to fill vacancies, the Tenth Circuit and District of Columbia Circuit held that an individual who meets the qualifications for a vacant position must be considered for that transfer and not denied the accommodation simply because there is somebody who is "better-qualified." The court in the United Airlines case recommended that the entire Seventh Circuit hear this case to determine whether it should adopt the interpretation of the Tenth and District of Columbia Circuits.

What is an employer to do? The court in the United Airlines case noted that an employer is not required to accommodate an individual for a job "for which there is a better candidate [pursuant to] the employer's consistent and honest policy to hire the best applicant." Note the Court's emphasis on "consistency." Are the factors an employer considers to fill a vacancy structured to include such factors as overall performance, skillset, and length of service? To the extent the employer's "policy" is more of a practice, then rejecting a qualified employee with a disability as a form of reasonable accommodation may be problematic.

Employee Suicide Comments on Facebook: Employer's Right to Act

Employers have grappled with what the proper policy is regarding employee use of social media to comply with the National Labor Relations Act and other statutory and common law standards. The cases involving employer actions based on social media postings typically involve employee comments about managers or the company. However, the case of *Peer v. F5 Networks, Inc.* (W.D., Wa., March 19, 2012) involved the unusual case where the employee posted comments about herself – stating that she was "dreaming up practical ways to kill myself."

Peer was hired in March 2010 after working for the employer as a temporary employee. Three months after she was hired as a full-time employee, she was diagnosed with major depression and began to work a reduced schedule. Shortly thereafter, she was released to return to full duty. However, her starting time changed to 6:00 a.m. and, two days later, she posted comments on Facebook about killing herself. She also stated that work was a "war zone" and that she had "some serious post-traumatic stress disorder."

The employer told Peer that due to its concern about her linking her job issues with suicidal thoughts, it would not allow her to return to work. However, the employer told Peer that it would work with her "in an interactive process about what accommodations you may need to perform the essential functions of your job without the kinds of direct risks or threats that presently exist." Two weeks later, the employer terminated Peer because "You and your doctor did not address the issue of whether you remained a threat of harm, and the linkage you made to your job."

Peer sued under the ADA, claiming that the employer failed to consider reasonable accommodation. The employer argued that Peer failed to provide medical substantiation that she could return to work without a risk to herself or to others. In permitting the case to go to a jury, the court said that even in a situation where an individual poses a direct threat to herself or to others, there still must be an interactive process to determine if there is reasonable accommodation available where there is not that risk of harm. In this case, the court ruled that it was a question for the jury to decide whether there had been a dialogue between Peer and her employer which would qualify as an "interactive process" under the ADA.

The employer acted properly in refusing to permit Peer to return to work without unequivocal substantiation that she could do so without posing a risk of harm to herself or to others. Where the employer fell short in this case was its ability to prove that it adequately engaged Peer in an interactive process. Peer claimed that when she had questions about the company's request for medical substantiation, the company sent her forms to fill out, but did not actually have a dialogue with her. An employer has the right to act on information it obtains, including an employee's social media communications, when that information conveys a potential threat of harm to that employee or to others. Employers should follow the interactive process, but unless there is unequivocal substantiation that there is not a risk of harm, the employer should consider alternatives, whether that may be a termination, layoff or leave of absence.

NLRB Tips: NLRB Recess Appointment/Notice Posting Rule Upheld by Federal District Court

This article was prepared for Frank F. Rox, Jr., NLRB Consultant for the law firm of Lehr Middlebrooks & Vreeland, P.C. Mr. Rox can be reached at 205.323.8217. Prior to working with Lehr Middlebrooks & Vreeland, P.C., Mr. Rox served as a Senior Trial Attorney for the National Labor Relations Board for more than 30 years.

Court challenges to the constitutionality of the Obama administration's recess appointments have yet to wind their way through to a final decision. However, employer groups challenging the NLRB notice posting rule scheduled to go into effect April 30, 2012 suffered a setback.

As noted in the January 2012 Employment Law Bulletin, the National Right to Work Legal Defense Fund and Education to Work Foundation Inc. and other groups with court challenges already pending, filed a motion with the U.S. District Court of Columbia requesting that the Court

hold President Obama's recess appointments to the NLRB "unconstitutional, null and void" and that the illegality of the appointments prevents the NLRB from implementing or enforcing a new rule requiring employers to post workplace notices of employee rights under the Act. (*Nat'l Ass'n of Mfrs. v. NLRB*, D.D.C., No. 11-cv-1629, motion filed 1/13/12).

On March 2, 2012, U.S. District Court Judge Amy Jackson issued her decision in this matter, finding that the Act provides the Board a "broad, express grant of rulemaking authority." In discussing the Board's authority to adopt rules under Section 6 of the Act, Jackson noted:

> . . . the notice posting rule at issue is authorized unless some other provision of the Act limits the Board's authority to impose such a requirement on employers. Plaintiffs complain loudly about the lack of Board authority here, but they fail to point to any limiting provision.
>
> . . . the Court cannot find that in enacting the NLRA, Congress unambiguously intended to preclude the Board from promulgating a rule that requires employers to post a notice informing employees of their rights under the Act. Neither the text of the statute nor any binding precedent supports plaintiffs' narrow reading of a broad, express grant of rulemaking authority.

In addition to finding that the Board had the authority to require employers to post the notice outlining employees' rights, the court rejected the challenge to the Obama recess appointments. In a separate legal memorandum and order, Judge Jackson characterized the plaintiffs' attempt to challenge the validity of the Administration's recess appointments as a "shoehorn" attempt to inject the appointment issue into the challenge to the notice posting rule, declaring that resolving the appointment issue was "not essential, or even relevant to resolving the merits of [the notice posting requirement]."

While the notice posting requirement was upheld, the court found that the Board exceeded its statutory authority in determining that any failure to post the notice would be considered an unfair labor practice:

> [t]he Court is not making an absolute statement that inaction can never be interference [with Section 7 rights]; rather this memorandum opinion simply holds that the Board cannot make a blanket advance determination that a failure to post will always constitute an unfair labor practice.

Finally, the court determined that the Agency cannot "toll' the statute of limitations under Section 10(b) of the Act where an employer has failed to post the notice.

On March 5, 2012, the parties to the District of Columbia lawsuit filed an appeal of the District Court ruling. On March 7, 2012, in response to a separate motion, Judge Jackson denied the plaintiffs' request to stay her order allowing the notice posting rule to go into effect. In finding that employers would not suffer "irreparable harm" if required to post the notice, Jackson stated that "if the Court of Appeals ultimately determines that the Board exceeded its authority in promulgating the Rule, then employers can take the notice down."

The plaintiffs have requested that the DC Circuit Court grant an emergency stay of Judge Jackson's ruling.

When, If Ever, Should Employers Provide Witnesses for Board Interviews During Unfair Labor Practice Investigations

The Board considers the "face-to-face" affidavit taken by the investigating Agent as the "keystone" of the unfair labor practice investigation and emphasizes that the affidavit is the preferred method to be used by the Regions:

> Affidavits [should] set forth exactly what each witness recalls and provide a permanent record of the testimony, which can be relied upon in making a decision regarding the case. In taking an affidavit, the Board agent should record the testimony of the witness as accurately and in as much detail as is possible and appropriate.

Sounds reasonable, right? Even though it sounds reasonable, there are a number of counter-veiling considerations that an employer must take into account before actually submitting a witness for a Board-generated affidavit. The purpose herein is to provide employers with a checklist to consider before providing witnesses during an unfair labor practice investigation.

Employers are not contacted by the Board to present evidence until the charging party's evidence has been presented and there is reasonable cause to believe that an unfair labor practice violation has occurred. (i.e. - a prima facie case has been established). Agents will then contact an employer, request their cooperation and further request that witnesses be presented to provide affidavits. At this point, as the employer is not privy to the contents of the Regional investigative file, it is not known whether the request for a witness is merely a balanced attempt to secure information necessary to make a merit determination, or rather an attempt by the investigating agent to "nail down" inconsistencies in the employer's position or obtain employer admissions against interest.

Thus, prior to providing witnesses, it is important that you thoroughly understand the allegations contained in the charge and whether a live witness will further the employer's chances of having the ULP allegations dismissed by the Agency. While the Agency claims that failure to present a live witness does not constitute "full and complete" cooperation, the truth of the matter is that many charges may be resolved without the provision of Board-generated affidavits.

The "Credibility" Question:

Case Handling Manual Section 10064 gives guidance to the Regions on how to deal with credibility issues. Employers should understand that Regions are expected to resolve factual conflicts only on the basis of compelling documentary evidence or "an objective analysis of the inherent probabilities in light of the totality of the relevant evidence." In simple terms, does the witness's story make any sense at all in the context of the circumstances?

In the event that credibility conflicts cannot be resolved on the basis of objective evidence, then Regions are instructed to issue complaint, absent settlement. With these preliminary considerations in mind, below is an outline of points to consider before voluntarily providing a live witness.

The Checklist:

1. Never begin an investigation by offering live witnesses until you determine the direction of the Regional inquiry. The Region will frequently telegraph the direction of the investigation with remarks as to the quality of the charging party's evidence, etc. When in doubt of the direction, ASK THE AGENT. While stating that the employer has not committed any unfair labor practices, you may ask if the agent sees anything to the charge, and if so, what evidence the employer needs to provide for the Region to make a non-merit determination. More often than not, the agent will share his/her thoughts with you on this issue. Early in the investigation process, you should be able to determine with a fair degree of certainty if there is any evidence that can be provided to rebut the prima facie case. Failure by the investigating agent to share the details of the direction of the investigation probably indicates that there is some "fire" where there is "smoke". Agents tend to hold the evidence adduced "close to the vest" if they have concluded that a complaint is likely, in order to give the Agency a better shot of winning at trial.

2. If innocent and you have the documents to prove it, make sure you provide everything required to establish the lack of merit to the charge. Tell the investigating agent that you have certain documents or other objective evidence that demonstrate that the charge does not have merit and that you will provide such evidence with a supporting position statement.

3. If you are in a "he said – she said" situation, with no witnesses and no objective evidence to rebut the prima facie case, consider cutting your losses and explore early on what it will take to resolve the charge.

4. Be aware that the Agency now frequently compels production of documents and live witness testimony. If this happens, it is possible that the Region is just engaging in "free" discovery and attempting to buttress its prima facie case in anticipation of trial. Again, in this situation, make an effort to limit your exposure by cutting your back-pay liability and explore settlement possibilities with the investigating agent.

Did You Know?

- In addition to requiring employers to post the Notice of Employee Rights, the Board intends to implement its changes to the election rules as of April 30, 2012.

EEO Tips: The Eighth Circuit Allowed the EEOC to Dodge a Bullet with Respect to Attorney's Fees?

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 February 24, 2012, the Eighth Circuit Court of Appeals upheld a grant of summary judgment against the EEOC on virtually all of some 270 claims of individual and class-wide sexual harassment by certain "Lead Drivers" (trainers/instructors) employed by CRST Van Expedited Inc, except that it reversed the District Court for the Northern District of Iowa's award of **$4,467,442** in attorney's fees and litigation expenses (Case Nos. 09-3764, 09-3765, and 10-1682). This award had been one of the highest in EEOC history, the payment of which would have put a serious crimp in the EEOC's litigation budget. That alone had to evoke a sigh of relief by the EEOC's General Counsel, P. David Lopez, who was clearly not pleased with the Eighth Circuit's holding on the key aspects of the case and commented that the Eighth Circuit's holdings were "unprecedented."

The District Court had also awarded $92,842 in costs which was allowed to stand. Additionally, it should be mentioned that three charging parties intervened in the EEOC's action and their cases were also resolved by the Eighth Circuit's decision.

The key issue in this case was whether it was necessary for the EEOC to identify each and every individually-affected class member prior to the issuance of its reasonable cause finding in order to fulfill all of the "conditions precedent" to the filing of a class action lawsuit under Section 706 (f)(1) of Title VII. The defendant employer contended that it was necessary in order to subject each claim to the conciliation process. On the other hand, the EEOC contended that it need only identify and conciliate the "type" of discrimination affecting the class as a whole, not necessarily each individual claim, during the administrative phase of the charge processing. As will be indicated later on in this article, the EEOC's position is not without some foundation. However, in this instance the Eighth Circuit found that case precedent in its own circuit required a finding of reasonable cause and conciliation of each claim.

The relevant facts of this case are as follows:

CRST Training Program. Upon being hired, all male and female driver trainees were given an orientation session which included review of a handbook containing, among other things, complete instructions pertaining to the company's prohibition of sexual harassment and what to do in the event that it occurs. Following orientation, each trainee was required to "embark" on a 28-day over-the-road training trip with an experienced "Lead Driver." The Lead Driver's responsibility was to familiarize the trainee with CRST's driving procedures or model and then to evaluate the trainee's performance at the conclusion of his or her maiden trip. While the Lead Drivers could instruct and later evaluate, they did not have authority to hire, fire, promote, demote or reassign trainees.

Charges Filed With the EEOC. Several female trainees filed charges with the EEOC alleging sexual harassment by various Lead Drivers during the course of their training trips. However, the EEOC based its lawsuit upon the charge of only one of the charging parties whose charge had been filed on December 1, 2005. During the EEOC's ensuing investigation of that charge, which lasted approximately two years, the EEOC made a number of requests for documents and information designed to uncover additional females who, similarly, had been sexually harassed during their respective training periods. CRST complied in part by sending certain limited information to the EEOC which in its judgment complied with the EEOC's requests and was consistent with the dates relative to the charging party's charge. The EEOC continued to ask for more information but such requests were refused. On July 12, 2007, the EEOC issued its letter of determination finding reasonable cause as to the

charging party's claim and a "class of employees" who also had been subjected to sexual harassment and inviting CRST to conciliate.

The EEOC's Lawsuit. Ultimately, conciliation failed and the EEOC filed suit on September 27, 2007 on behalf of one charging party (Monika Starke) and a "class of similarly situated female employees." However, from the date suit was filed until two years later, the EEOC did not identify the female employees allegedly comprising the putative class. During the course of discovery, the EEOC at various times sent approximately 2,730 letters to female employees of CRST soliciting their participation in the lawsuit. From this effort, the EEOC advised the court that it had identified approximately 270 allegedly aggrieved persons for inclusion in the affected class. Unfortunately for the EEOC, virtually all of those identified were rejected by the district court for various reasons including (1) that their claims were untimely, (2) that the EEOC was precluded from advancing their claims as a discovery sanction because of the EEOC's failure to meet discovery deadlines for deposition purposes; (3) that their claims were not severe or pervasive, and (4) that, as to 67 of the class members, the court concluded that the EEOC did not investigate, issue a reasonable cause determination, or conciliate the claim. Moreover, the district court found that, even though some of the 67 class members in question had been sexually harassed before the EEOC issued its determination on July 12, 2007, the EEOC admitted it was not aware of their claims until after the complaint was filed and that the EEOC had used discovery in the underlying lawsuit to find them.

In upholding the district court's findings, the Eighth Circuit acknowledged that the EEOC had wide latitude in investigating and filing lawsuits related to a charge of discrimination. The court stated:

> "The EEOC's suit alleging multiple acts of discrimination by CRST arose out of Starke's single initiating charge. Relevant precedents permit such an expansion by the EEOC, so long as the EEOC satisfies all of its pre-suit obligations for each additional claim" The Supreme Court has observed that when the EEOC brings suit under Section 706 on behalf of a group of aggrieved persons, the EEOC is "master of its own case." (*quoting EEOC v. Waffle House, Inc.*, Sup. Ct. (2002). And, as a general rule, "the nature and extent of an EEOC investigation into a discrimination claim is a matter within the discretion of that agency." *EEOC v. KECO Industries, Inc.* (6th Cir. 1984).

However, according to the Court, the EEOC's latitude is limited as follows:

> "….The original charge is sufficient to support EEOC action, including a civil suit, for any discrimination stated in the charge or developed during a reasonable investigation of the charge, so long as the additional allegations of discrimination are included in the reasonable cause determination and subject to a conciliation proceeding." *EEOC v. Delight Wholesale Co.*, (8th Cir. 1992) (underlining added).

In summarizing its findings the court made the point that "…we find a clear and important distinction between facts gathered during the scope of an investigation and facts gathered during the discovery phase of an already-filed lawsuit." *Quoting EEOC v. Jillian's of Indianapolis* (S.D. of Indiana, 2003). The EEOC may not use discovery in the resulting lawsuit as a fishing expedition to uncover more violations. *Quoting EEOC v. Target* (E.D. of Wis. 2007)

One important victory for the EEOC was that the Eighth Circuit reversed and remanded the district court's finding as to two class members, Sherry O'Donnell and Tillie Jones, that their harassment as a matter of law was insufficiently severe or pervasive. The Eighth Circuit found that the EEOC had established genuine material issues of fact in their cases as to whether the harassment was indeed severe and/or pervasive. This finding saved the Commission (at least temporarily) about $4.5 million dollars because as the court stated, "we vacate, without prejudice, the district court's award of attorney's fees to CRST because in light of these ….rulings CRST is no longer a "prevailing" defendant under 42 U.S.C. Section 2000e-5(k)."

Showing strong support for the EEOC's position, Circuit Judge Murphy dissented from the majority opinion. Judge Murphy actually cited some of the same cases used by the majority in his arguments but to the exact opposite effect as follows:

> "Neither Title VII nor our prior cases require that the EEOC conduct its presuit obligations for each

> complainant individually when litigating a class claim. Rather, we have required that the EEOC perform these duties for each type of Title VII violation alleged by the complainant. *EEOC v Delight Wholesale Co.*, (8th Cir. 1992). Other circuit courts have similarly held that the "nature and extent" of the EEOC's investigation is beyond the scope of judicial review and that the EEOC need not separately conciliate individual class members when pursuing a class based sexual discrimination claim. *EEOC v. KECO Indus.*, (6th Cir. 1984); *see also EEOC v. Rhone-Poulenc, Inc.*, (3rd Cir. 1989).
>
> …The majority's new requirement that the EEOC separately investigate and conciliate each alleged victim of discrimination is inconsistent with the purpose of Title VII. Under this standard, employers can avoid disclosure to the EEOC of complaining workers while the commission is conducting its investigation and conciliation, then reveal the names during court-ordered discovery, and seek dismissal of the entire case on the ground of inadequate presuit efforts by the EEOC."

Conclusion. As stated above, this case has been remanded to the District Court for the Northern District of Iowa for further proceedings with respect to the allegations of severe and pervasive sexual harassment of two of the affected class members. Obviously, the EEOC must present a strong case on behalf of the two claimants in order to avoid any further attorney's fees and litigation expenses. Beyond that, it is not clear whether the EEOC should appeal the Eighth Circuit's decision. Obviously, there is a division within the Circuit Courts of Appeals on the key issues in this case. Recently, the EEOC has made systemic cases a priority in its National Enforcement Plan and the issues in this case will be at the center of its enforcement efforts. However, given the prolonged investigation and other factual problems encountered by the EEOC (some self-imposed, in this case), it may not be a good litigation vehicle to test the Eighth Circuit's holdings.

If you have any questions about the lawful scope of the EEOC's investigative or conciliation procedures, please feel free to call this office at 205.323.9267.

OSHA Tips: Temporary Workers and OSHA

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.

Who is responsible for OSHA compliance when temporary or leased employees are involved? Would this be the agency supplying these employees or the client employer for whom they are working? Through interpretive letters and compliance directives to staff, the agency asserts that it can be a shared responsibility. The temporary staffing service, as a result of an ongoing relationship with the employee, could likely carry some recordkeeping and training obligations. However, the primary responsibility will reside with the client employer who creates and controls conditions at the workplace. It is that employer who can ensure machinery is guarded, necessary personal protective equipment is utilized, and the like. The temporary service agency would need to maintain all medical monitoring and exposure records created by client employers on agency employees.

This issue of client employer versus temporary service agency responsibility is focused mostly in the area of employee training. There is no waiver on the various training requirements simply because the temporary employee's assignment is of a short duration. For instance, training or safety instruction must be given to construction employees even for very short-term jobs. OSHA has often found situations where permanent employees were properly trained as required by a particular standard, but not their temporary counterparts. This has resulted in citations and significant penalties.

The need to define responsibility frequently arises with the hazard communication standard and its training requirements. Here the temporary service agency would be expected to provide some generic training. The client employer would then have to provide the specifics as to the hazardous chemicals used at their site along with training in the worksite's implementation of their hazard communication program. Similarly, the bloodborne pathogens standard would require generic training by the

leasing agency with site-specific training and implementation by the client employer. Under this standard, the temporary service would also need to ensure that employees receive required vaccinations and follow-up evaluations after exposure incidents.

OSHA points out in interpretive documents that the client employer may wish to specify the qualifications they will require of personnel supplied to them. This could include training in some particular chemicals, use of personal protective equipment, etc. It is also advised that contracts between the parties clearly define their respective responsibilities so that all OSHA requirements will be met.

A recordable injury or illness to a temporary worker should be entered on the client employer's OSHA 300 log if that employer performs the day-to-day supervision of the worker. The temporary labor service should not record the case. OSHA regulation 1904.31 suggests that client employers and labor supply services coordinate their recordkeeping to ensure that a case is recorded only once.

Wage and Hour Tips: 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.

As previously reported, even though the Fair Labor Standards Act (FLSA) has been in effect for over 70 years, there is still litigation regarding the meaning of certain parts of the Act. Last week, the U.S. Courts released their caseload statistics for the year ended March 31, 2011. The release shows that more than 7,000 FLSA cases were filed, which is an increase of almost 1,000 over the number filed in the year ended March 31, 2010. More cases were filed in Florida than any other state.

The area that continues to generate much of the litigation involves the exempt status of certain employees. The U.S. Supreme Court has agreed to hear an appeal regarding pharmaceutical representatives. The instant case deals with employees of GlaxoSmithKline drug sales representatives. In this case, the U.S. Ninth Circuit Court of Appeals had found the employees to be exempt as outside sales employees. Another Circuit Court of Appeals had found that the drug sales representatives were exempt as administrative employees. The Second Circuit Court of Appeals had determined drug representatives employed by Novartis did not qualify for either exemption. An attempt was made to get the Supreme Court to review the Novartis case but the Court declined to do so. In both the *Novartis* and *GlaxoSmithKline* cases, Wage and Hour filed briefs contending that the employees should not be exempt. The Supreme Court's ruling in this case will potentially affect some 90,000 employees. Even though the Supreme Court has not issued its ruling, Novartis recently agreed to pay $99 million to settle their case that involved some 7000 plaintiffs.

In another exemption case, on March 19, 2012, the Supreme Court refused to hear a case involving the exemption status of New York City Police Department sergeants. The Second Circuit Court of Appeals held, following the Wage and Hour position in the regulations regarding "first responders", some 4300 sergeants do not qualify for the executive exemption as their primary duty is to "investigate crimes," even though they also direct the work of other employees.

In his budget request to Congress for the fiscal year beginning October 1, 2012 (FY 2013), President Obama requested $238,000,000 for Wage and Hour. This is slightly less than the amounts received by Wage and Hour in FY 2010 and FY 2011. However, during the past three years, the full-time equivalent number of Wage and Hour authorized employees has increased from 1283 to 1759. I saw an article on the Wage and Hour website noting that they had recently trained 110 new investigators. Thus, as you can see, Wage and Hour is intending to continue its stepped up enforcement activities.

A section of the Fair Labor Standards Act that many employers either have not heard of or choose to ignore is that "anti-retaliation" provision. In 2011, the Supreme Court said that employees could file oral complaints under the law. This month, the Fourth Circuit Court of Appeals ruled that an employee had engaged in protected activity when as part of a group of employees meeting with the

company's chief operating officer (COO), the employee reported that her supervisor was altering timesheets to remove overtime hours. The COO reported he would look into the allegations. However, the employee was terminated six days later because there was "too much conflict" between the employee and her supervisor. Even though the district court ruled for the employer, the appeals court ruled that the employee had engaged in a protected activity and thus was protected by the FLSA's anti-retaliation provision. Even if an employee does not file a formal complaint, either written or oral, employers should be very cautious about taking action against any employee who has raised an issue with management concerning compliance with the FLSA.

There are also some other areas of the FLSA where Wage and Hour is continuing to take a hard line. One involves the use of tip credit by restaurants. I have recently seen several cases where they have disallowed the use of the tip credit because employers have been requiring the tips to be shared with traditionally non-tipped employees such as kitchen personnel and greeters. Also, they are enforcing a position that all tips received are the property of the tipped employees (they may be divided with other employees that are in the tip pool but no one else) even if the employer does not claim a tip credit. This month a California restaurant was ordered to pay more than $400,000 to employees that were forced to return their paychecks to the employer and subsist on their tips only. Also, in March, a group of eight up-scale New York restaurants agreed to pay over $5 million in back wages for deducting a portion of the wine sales from the employee's tip pool.

For those golfers that see this, you will be interested to know that Wage and Hour in Florida has begun investigating golf course operators and requiring them to pay starters and rangers the minimum wage. It has been a common practice for course operators to pay these "volunteers" for their time via free rounds of golf. As a result of an investigation by Wage and Hour, a club in Orange Park, Florida was required to pay over $70,000 in back wages to 19 employees. Wage and Hour's position is that only volunteers at charity tournaments or at nonprofit facilities may be paid with free rounds of golf.

There have also been a couple of Family and Medical Leave Act issues of which you should be aware. Earlier this year, the Eleventh Circuit Court of Appeals ruled that an employee who was not yet entitled to take FMLA leave was still protected by the Act. The employee began work for the firm in October 2008 and in June 2009 informed the employer that she was pregnant and would need FMLA leave after the birth of her child in November 2009. The employer in September 2009 terminated the employee. The employee filed suit alleging interference and retaliation for exercising her right to take FMLA leave. The court found the employee was protected, as she would have met all of the requirements as of the date the leave was to begin and the employee could advance her claim.

In a March 20, 2012 ruling for the employer, the Supreme Court ruled that an employee of a state government (*Coleman v. Court of Appeals of Maryland*) was not entitled to sue the state for money damages under the self care provisions of the Family and Medical Leave Act. By a five to four decision, the court stated that Congress did not validly exercise its power under the constitution when it abrogated a state's sovereign immunity from lawsuits under the Act. This decision conflicts with a Supreme Court 2003 (*Nevada Department of Human Resources v. Hibbs*) decision that allowed an employee to be protected by the FMLA to care for an ill parent, spouse or child. The effect of this decision is that an employee of a state government is protected by the FMLA to care for an ill parent, spouse or child, but the same employee is not protected by the FMLA during his own illness.

2012 Upcoming Events

EFFECTIVE SUPERVISOR®

Huntsville – April 14, 2012
U.S. Space & Rocket Center

Montgomery – April 24, 2012
Hampton Inns & Suites, EastChase

Decatur – May 2, 2012
Turner-Surles Community Resource Center

Birmingham – September 18, 2012
Bruno's Conference Center, St. Vincent's

Huntsville – September 26, 2012
U.S. Space & Rocket Center

For more information about Lehr Middlebrooks & Vreeland, P.C. upcoming events, please visit our website at www.lehrmiddlebrooks.com or contact Marilyn Cagle at 205.323.9263 or mcagle@lehrmiddlebrooks.com.

Did You Know…?

…that on March 22, 2012, FedEx agreed to a $3 million settlement with OFCCP? This involved discrimination claims for 21,635 applicants based on race, sex and national origin. OFCCP reports this is its largest settlement in eight years. The OFCCP complaint arose based on its statistical analysis of FedEx hiring practices. According to OFCCP, its investigations do not have to be complaint-based. "These victims didn't know they were being discriminated against. That's the beauty of OFCCP." Labor Secretary Hilda Solis stated that, "This settlement is proof that we will aggressively protect workers, promote workplace diversity and ensure the laws governing federal contractors."

…that Iron Chef Mario Batali's restaurants owe $5.25 million in back pay for wage and hour violations? Mario Batali is a world-renowned chef, who received great notoriety for his frequent success on The Food Network's "Iron Chef" show. This settlement involves 1,100 employees at all of the restaurants that Batali and a partner own in the New York area. What was their violation? The Iron Chef's company deducted from the employee tip pool four to five percent of all locations for the company to keep. One-third of the award will be paid to the plaintiffs' attorneys.

…that NLRB unfair labor practice charges and representation election petitions continue to decline? This is according to a report issued on March 8 by NLRB Acting General Counsel Lafe E. Solomon. During FY 2011 (September 30), there were 22,177 unfair labor practice charges filed nationally, a 5.1% decline from 23,381 during FY 2010. A total of 2,634 petitions for certification of representation were filed during 2011, down from 11.2% (2,969) during FY 2010. Petitions for representation elections declined by 21% during FY 2011, from 1,423 compared to 1,790 during FY 2010. The NLRB notice-posting requirement is an approach for the Board to try to increase its case load and its additional funding from Congress.

…that Congress is considering legislation to permit employees to decide when they want to go to work or stay home? Just kidding, in the spirit of April Fool's Day. Actually, the legislation we refer to is called the Working Families Flexibility Act, which would increase the opportunities for employees to seek modification of their work hours, schedule and work location. Introduced by Senator Bob Casey (D., Pa.) and Representative Carolyn Maloney (D., NY), the bill according to Casey and Maloney would "help businesses benefit from more productive employees and empower workers with the knowledge of what arrangements are possible to accommodate their family life." Employees would be protected from retaliation for asking for those modifications and it would be enforced by the United States Department of Labor.

…that average first year wage increases negotiated during 2012 were 1.7%, compared to 1.6% a year ago? Manufacturing agreements averaged an increase of 2%, compared to 2.2% during 2011, and non-construction, non-manufacturing employers had an increase of 2.3%, compared to 1.8% in 2011. This information was provided by the Bureau of National Affairs.

LEHR MIDDLEBROOKS & VREELAND, P.C.

Donna Eich Brooks	205.226.7120
Whitney R. Brown	205.323.9274
Matthew J. Cannova	205.323.9279
Lyndel L. Erwin (Wage and Hour and Government Contracts Consultant)	205.323.9272
Michael G. Green II	205.323.9277
John E. Hall (OSHA Consultant)	205.226.7129
Jennifer L. Howard	205.323.8219
Richard I. Lehr	205.323.9260
David J. Middlebrooks	205.323.9262
Jerome C. Rose (EEO Consultant)	205.323.9267
Frank F. Rox, Jr. (NLRB Consultant)	205.323.8217
Matthew W. Stiles	205.323.9275
Michael L. Thompson	205.323.9278
Albert L. Vreeland, II	205.323.9266

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