LEHR MIDDLEBROOKS & VREELAND, P.C.

Employment Law Bulletin

JULY 2012
VOLUME 20, ISSUE 7

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Employer Gets Scratched by "Cat's Paw"

Employers can be liable for decisions they don't even realize were influenced by illegally biased managers. Take the case of *Chattman v. Toho Tenax Am. Inc.* (6th Cir. July 13, 2012), which involved an African-American employee who received a written warning for horseplay. In *Chattman*, the employer's policy provided that an employee is ineligible for a promotion if the employee has received a written warning during the prior 12 months. The employee, Chattman, had a 20-year record of good performance, no prior warnings, and claimed that white employees who also engaged in horseplay received no discipline. The company's president and vice president of human resources agreed to issue the warning. Neither knew of the illegal racial bias of the human resources manager who recommended the discipline.

In permitting the case to go to a jury, the Court of Appeals stated that when an employee experiences a materially adverse employment action due to the biased influence of another, that bias may be attributed to the ultimate decision-makers even when the ultimate decision-makers had no knowledge of the bias. In *Chattman,* evidence showed that the human resources manager had used racial slurs and told racial jokes. The company president and vice president of human resources were unaware of that bias when they relied on the human resources manager's investigation and recommendation that Chattman should be disciplined for the horseplay. The Court stated that, "There can be little doubt that [the manager of human resources] desired Chattman's termination when he made his recommendation and fabricated the agreement of other supervisors in his communications with the [president] and [vice president of human resources]. We do not believe the fact that Chattman was ultimately issued a final written warning rather than terminated alters this or the proximate cause analysis." The human resources manager "misinformed" and "selectively informed" the company president and vice president of human resources about the incident resulting in Chattman's discipline, which ultimately caused him the harm of denial of a promotional opportunity.

What we find difficult to believe about this case is how a manager of human resources could have told racial jokes and used racial slurs and this information not be reported to others in the company. One approach to minimize the risk of a "cat's paw" claim is for ultimate decision-makers to interview the employee who is subject to discipline, where it may be an adverse action such as the denial of a promotion, or termination. At least one level of review of such a recommendation should include a discussion with the individual about whom the recommendation is made. In such a circumstance, it may diminish the argument that the biased recommendations of a subordinate were the "proximate cause" of an adverse action toward the employee.

AFL-CIO and "Second Bill of Rights"

As the political season heats up, so will the AFL-CIO's political efforts. The labor organization is planning a rally on August 11th in Philadelphia entitled "Workers Stand for America." This rally will be the initial rollout of what the labor organization is referring to as a "Second Bill of Rights" for Americans. It will ask the Republican and Democrat parties to adopt the following principles in their party platforms:

1. The right to full employment and a living wage.
2. The right to full participation in the electoral process.
3. The right to a voice at work.
4. The right to a quality education.
5. The right to affordable health care.

AFL-CIO President Richard Trumka also said that, unlike prior presidential elections, the AFL-CIO will not host "extravagant events" surrounding the Democratic party convention (but they will still do so around the Super Bowl). Rather, the labor organization has signed up 400,000 volunteers to help get out the vote in several elections. According to Trumka, "You will see an effort on the ground that is bigger and broader than in the past."

Court Weighs in on Obesity as a Disability

Obesity alone can qualify as an ADA disability, regardless of whether it is the result of a psychological impairment. So says the Montana Supreme Court in the case of *BNSF Ry. Co. v. Feit* (Mont. S. Ct. July 6, 2012).

The case involved an individual who applied for a position with the Burlington Northern Santa Fe Railway Company as a conductor. In declining the individual's application for employment, the railroad said he was not qualified for the position because employing him would pose "significant health and safety risks associated with extreme obesity." He then filed a discrimination charge and a lawsuit in Montana federal district court. The judge asked the state supreme court to determine whether, under a state law version of the ADA, obesity is considered an impairment when it is not associated with a psychological condition?

The court review the EEOC regulations under the Americans with Disabilities Act, which state that the definition of "impairment" does not include "physical characteristics such as weight that are within normal range and are not the result of a physiological disorder." The court said this language means that if the weight is within "normal" range, then a physiological disorder must exist for the person to be considered impaired under the ADA. Moreover, the court referred to the EEOC's compliance manual, which states that "severe obesity, which has been defined as body weight more than 100% of the norm, is clearly an impairment." The court stated that, "The EEOC's interpretation supports a conclusion that weight outside "normal range" may constitute a physiological condition within the definition of impairment if it affects one or more body systems." Thus, a person is disabled within the meaning of the ADA if that person is "severely" obese (at least double the weight that is "normal" for the individual), and such obesity affects one or more body systems. The obesity does not have to be caused by a physiological condition; it only has to cause an impairment to one or more body systems.

In the Montana court's 4-3 decision, the dissent argued that there must be a physiological disorder and severe obesity for the individual to be considered impaired. Based on the increasing number of overweight, if not

obese, Americans, we expect more issues to arise regarding obesity as a disability. However, those who are substantially overweight, but not obese according to the EEOC, are not considered disabled because of their weight. They may have medical conditions as an outcome of their weight which qualifies as a disability, but the weight, itself, is not a disability and accommodation is not required.

Expanding Range of "Supervisor" Jobs Challenges Wage and Hour Exempt Status

Although evolving workplace supervisory models continue to delegate traditional supervisory responsibilities to more and more low level employees, this trend is resulting in greater legal risk for employers because it has eroded the historical bright line of who is and is not a supervisor. The historical "supervisor" responsibilities to direct the employee, issue discipline, grant or deny time off, and terminate, have been pushed down to team leaders, team coaches, facilitators and supervisors who may request that such actions be taken but ultimately do not have the authority to carry them out. The more such responsibility is delegated without the actual authority to act on it, the greater the risk under the Fair Labor Standards Act that an "executive" exempt classification is inapplicable.

To qualify for the "executive" exemption from minimum wage and overtime requirements of the FLSA, the individual must have responsibility over a defined group of employees (2 or more), such as a department, division or function, and have the authority to make those decisions that affect the employee's status (or responsibility to make recommendations to affect that status and such recommendations are given "great weight"). In the case of *Ramos v. Baldor Specialty Foods Inc.* (2d Cir. July 12, 2012) the court considered application of the executive exempt status to the role of "shift captains."

The employer is a wholesale food distributor. Its "shift captains" supervise "order pickers." Each captain supervises approximately three to six employees. Captains are assigned a general area of the warehouse and they have the authority to discipline and terminate pickers and also to recommend to their manager which pickers should receive raises, promotions or transfers. In considering the case, the court was forced to decide whether the group of pickers were a "customarily recognized department or subdivision" as required for exempt status.

In reviewing the Fair Labor Standards Act regulations, the court stated that a functional "unit" is one that "must have a permanent status and a continuing function." If the group of employees supervised is "a mere collection of employees assigned from time to time to a specific job or a series of jobs," then there is not the supervisory authority over a unit to qualify for exempt status.

The shift captains argue that because approximately 20 of them worked on the same shift essentially doing the same thing with the same types of employees, there is not a distinct functional "unit" to qualify for exempt status. The court disagreed, stating that, "The job of supervising a team of employees becomes no less managerial merely because the team operates alongside other teams performing the same work in the same building. A company's decision to organize its workforce in that way does not render each team a mere collection of employees assigned from time to time to a specific job."

Remember that it is the employer's burden to prove the existence of an exemption. To the extent the classic "supervisor" is now replaced by a team lead, a team coach, or other title where the employee's authority is limited, then the employer is in a vulnerable area of whether it may sustain the exempt status.

NLRB Tips: The NLRB Push to Expand Protected Concerted Activity Protections

This article was prepared by Frank F. Rox, Jr., NLRB Consultant for the law firm of Lehr Middlebrooks & Vreeland, P.C. 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. Mr. Rox can be reached at 205.323.8217.

An activist National Labor Relations Board (NLRB) intends to expand its regulatory reach in the area of protected concerted activity (PCA). On June 18, 2012,

partially in response to a Court ordered injunction delaying the implementation of the Agency's notice posting rule, the Board launched a new website outlining typical scenarios involving concerted employee action that would be protected under the Act. In effect, the NLRB is advertising and "soliciting" business by describing to employees how to protect themselves from retaliatory actions by an employer should they complain about working conditions. As Board chairman Mark Pearce has stated:

> The right to engage in protected concerted activity is one of the best kept secrets of the National Labor Relations Act, and more important than ever in these difficult economic times. Our hope is that other workers will see themselves in the [highlighted cases] and understand that they have strength in numbers.

While there is nothing inherently wrong with informing the public of the law pertaining to protected, concerted activity, a detailed "cookbook" of the steps necessary to build a "case" in order to receive the Act's protection raises concerns. In my years of practice at the NLRB, I observed many a caller attempt to tailor and embellish his or her story to fit a pattern of facts that would invoke the protections of the Act. The proper technique for a Board agent taking a public call is to simply ask what happened and ask the caller pertinent questions to ascertain whether a violation of the Act occurred. The role of a prosecutorial agency is not to give the caller a tutorial on how to "make a case." An agent's high degree of involvement in guiding and establishing a violation, at best, encourages exaggeration of the facts, and, at worst, outright perjury. It is a legitimate concern of thoughtful individuals that the Agency has gone too far in its desire to expand its reach and further organized labor's agenda.

Despite these concerns, the Board is determined to proceed with its plans to put the Agency, as Chairman Mark Pierce has said, "out of mothballs in the attic of the house and moving [the NLRA] down to the kitchen". Given the Board's aggressive stance, the potential exists that the Agency will attempt to expand the use of injunctive relief in appropriate PCA cases. Such cases might involve situations where an adverse employment action taken against an employee has a significant chilling effect on employees voicing complaints about wages, hours, or other working conditions, and thus adversely impacts on a public right under the Act.

Before turning to selected examples of cases (taken from the Board's new website) where the Board found employees to be protected for voicing complaints about work, it is worthwhile to briefly provide the general analytical framework employed by the Board in making its PCA determinations.

The Analytical Framework:

- Is It Concerted:

The Board defines "concerted activity" as those circumstances where "individual employees seek to initiate or to induce or to prepare for group action." In other words, does the complaint concerning pay, hours of work, safety, workload, or other terms and conditions of employment benefit more than the one employee taking action? As long as the employee complaint is not an individual "gripe," then chances are the Board will find the complaint to be concerted – and also find a way to protect the complaining employees' rights.

- Is It Protected:

As long as an employee's complaint involves a "term or condition of employment", then the complaint will be deemed protected under the NLRA.

However, even if protected and concerted, certain misconduct by employees will jeopardize their right to engage in PCA. Generally, the test "is whether the conduct [of the complaining employee(s)] is so egregious as to take it outside the protection of the Act, or of such a character as to render the employee unfit for further service."

EXAMPLES OF EMPLOYEES ENGAGING IN PROTECTED, CONCERTED ACTIVITY

The summarized examples of cases that were determined by the NLRB to constitute PCA demonstrate the Agency's resolve to publicize, and, in some cases expand, employee rights under the Act. As noted above, the newly launched website is intended to provide a "road map" for employees wishing to invoke the protections of

the NLRA. The Agency anticipates that its initiatives in publicizing PCA will result in a significant increase in case intake unrelated to union organizing efforts.

1. After employer announced a wage cut, a group of employees wrote a letter in protest of the pay cut. The letter signers were later transferred to another job site and then fired. Complaint issued and the employer settled the matter by offering employees full back pay (wages lost as a result of adverse action) and offers of reinstatement.

2. Construction workers appeared on a U-Tube video complaining of unsafe working conditions at a work site. The employer discharged the complaining employees after viewing the video. The employer continued to threaten remaining employees with retaliation if they complained about safety on the job. The Board found a violation and issued complaint. Workers received back pay and an offer of reinstatement to their former positions.

(In the future, this scenario is a potential injunction vehicle for the Agency, because of the ongoing threatening conduct toward the remaining employees and the attendant chilling effect on employees engaging in PCA. This is also an area where there could be overlap between the Dept. of Labor OSHA non-retaliation provisions under Article 11 of OSHA).

3. A statutorily defined supervisor refuses to reveal the names of employees who had signed a petition protesting working conditions to top management. Board found that supervisor's discharge was improper because she had refused to commit an unfair labor practice by punishing employees engaged in PCA. Supervisor and another employee involved in the petition were discharged and ultimately awarded $900,000 in back pay.

4. Employee discharged for discussing wages with her supervisor and friend in violation of the employer's handbook. The Board found a violation of the Act.

(Any rule which prohibits employees from discussing wages, hours of work, or other work conditions is overly broad and any adverse action taken against an employee for violating the offending rule will be deemed illegal by the Board).

5. Poultry workers walked off the job to protest a new requirement that employees had to pay for latex gloves used by the employees. Two employees told the story to a local paper and were quoted and identified in the article. Both were discharged. One employee received back pay in settlement after the trial and the other was not provided a remedy due to her illegal immigration status.

6. LPN complained about favoritism on the job. While appearing to be an individual complaint, and thus not concerted, the Board found LPN's discharge was a "preemptive" strike to keep the employee from discussing the issue of favoritism with other employees. The Board thus ordered back pay and reinstatement.

(This is a classic example of the Board's intent to extend its regulatory reach by aggressively applying PCA analysis to adverse employment actions. Any workplace complaint, however attenuated to an actual group concern, could be found concerted under this analysis. During an appeal of the decision, a court appointed mediator convinced the employer to settle the case for $250,000 in back pay).

7. An employee complained he was improperly denied overtime because he and other employees were misclassified as statutory supervisors. The supervisor desired to join with other supervisors to file a collective wage and hour claim against the employer, but was precluded from doing so because he signed the employer's mandatory arbitration agreement.

   Under that agreement, which individuals were required to sign as a condition of employment, all employees agreed to submit any work place disputes or claims to an arbitrator outside the court system. In addition, the signed arbitration agreement stated that any claims made under

the agreement would be limited to individual claims – not group action. The Board found that the arbitration agreement precluded employees from engaging in concerted activity because they were precluded from filing or pursuing complaints on a joint basis.

(This is the *D.R. Horton* case, which is currently pending appeal in a U.S. Court of Appeals. It should be noted, and the Board has acknowledged, that the U.S. Circuit Courts have not applied *D.R. Horton* in other mandatory arbitration situations outside of an NLRA setting. This case seems destined to end up at the U.S. Supreme Court to answer the question as to the appropriate balance between other statutes and doctrines (such as the Federal Arbitration Act, wage and hour regulations etc.) and the application of national labor law policy underlying the Act. (i.e. – protecting the Board's interest in expanding employee rights under a PCA framework).

8. Welders working on a contract basis under temporary work visas signed a petition protesting poor living arrangements and irregular hours. When the petition was delivered to the employer, it threatened the bearer of the petition with deportation and discharged him the same day. The Board found that the actions of the employer were in violation of the Act, and issued a complaint. The case settled prior to trial for $13,000 in back pay.

9. The staff at an urgent care center wrote an anonymous letter to the employer, asking the owner/doctor to reconsider his decision to cut wages by 10%. Employees also suggested alternative cost saving methods. Thereafter, the employer fired the two employees who drafted and edited the letter complaining of the proposed wage cut.

   The Region issued a complaint and the administrative law judge found that the employee complaints were not individual "gripes" and were thus protected under the Act. The Board unanimously upheld the ALJ decision.

10. Female employees have discussions as to the perceived shortcomings of a newly hired supervisor and subsequently discover that he is a registered sex offender. The employees requested a group meeting to discuss the situation, but were called in individually and disciplined. One complaining employee was discharged; others were demoted.

    After investigation by the NLRB, the employer settled the case by offering back pay and reinstatement to all employees that were retaliated against because of voicing their work place concerns about the supervisor.

11. During a thunderstorm, employees retreated indoors to wait out the storm. Supervisors ordered the workers to return to work, who refused to do so for fear of electrical shock during the storm. All employees that refused the order to return to work were discharged on the spot.

    Following an investigation, the Region issued a complaint alleging that the employer interfered with the employees' rights to engage in concerted activity to help each other on the job (to assist each other for the purpose of mutual aid and protection).

12. An employee criticized her supervisor on a Facebook post, which prompted fellow employees to respond in sympathy. Finding that the Employer's social media policy was overly-broad and contained illegal provisions, the Region issued a complaint alleging that the employer discharged the complaining employee for engaging in PCA. The case was settled when the employer agreed to revise its social media policy and also reached a private settlement with the discharged employee.

The cases summarized above follow the PCA examples outlined on the NLRB website. There are countless other examples of situations where employee complaints might constitute protected concerted activity. As discussed above, applying the analytical framework to workplace

complaints provides a fairly accurate predictor of potential outcomes in PCA cases if a charge is filed.

EEO Tips: What Does the EEOC's New Strategic Enforcement Plan Mean to Your Firm?

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 22, 2012, the EEOC adopted a preliminary "**Strategic Enforcement Plan"** (SEP) for fiscal years 2012 through 2016. On July 18th, it continued its solicitation of comments on the plan from the general public, or "stakeholders," as the EEOC calls them. The plan itself is to be implemented by September 2012.

What does all of this mean to employers? What should they expect with respect to any new charge processing or litigation priorities? That of course depends on how far the EEOC will go in following its new SEP as written or modifying it to include some of the recommendations made by those persons and organizations who made comments on July 18th.

Before highlighting the major provisions of the new SEP, let's look at the most significant provisions of the current charge processing system in order to show the difference between the two. The current system was adopted by the Commission in 1995-96. At that time, it was called the "**National Enforcement Plan**" (NEP) and included certain new administrative and litigation enforcement procedures as follows:

- It eliminated the concept of devoting a full investigation to every charge and adopted the present "*Priority Charge Handling Procedure*" (PCHP) under which charges, as they were received, were classified (prioritized) according to their potential as a litigation vehicle as follows: **Class A –** High Priority; **Class B –** Moderate priority needing additional investigation; or **Class C** – low priority and subject to dismissal. Class A charges were put on a special investigative track to be developed for litigation.

- Litigation authority was delegated directly to EEOC District Offices for certain cases and litigation priorities included cases to support the Commission's view of issues under the Americans with Disabilities Act and cases involving retaliation.

- Mediation was introduced and encouraged as an *Alternative Dispute Resolution* method for the disposition of charges.

- During the intervening years, the Commission also launched special initiatives including the filing of systemic charges in order to maximize the reach of its enforcement efforts in the face of dwindling budgetary resources.

- The various District Offices were directed to develop ***"Local Enforcement Plans"*** in order to focus on issues of a local nature which might be prevalent within a given state or geographical area.

Incidentally, prior to the current SEP, the Commission had not updated its National Enforcement Plan which it replaces. Presently, it contains three broad strategic objectives, as follows:

1. **To combat employment discrimination through strategic law enforcement.** Under this objective, the Commission would keep the same basic *Priority Charge Handling Procedure*, but tweak it in order to process the increasing number of charges being filed. For example, it was observed that in FY 2011, the EEOC received a record **99,947** total charges. It also resolved a record **112,499** charges but still had approximately 78,000 charges remaining in the FY 2011 ending inventory. These charges of course had to be carried forward and processed in FY 2012. The problem the Commission faced was that it had to find some way to effectively reduce its yearly beginning inventories (78,000 in FY 2012 as referred to above) and still keep

up with an ever-increasing number of new charges which may well exceed 100,000 in each of the next four years covered by the SEP.

The SEP is somewhat vague on specifics, but the following broad measures (listed as **Strategy 1.A.1** through **Strategy 1.A.3**) which the EEOC plans to take in order to achieve the first strategic objective can be summarized as follows;

- Establish priorities and integrate the EEOC's investigation, conciliation and litigation responsibilities. (No specific priorities are stated).

- Rigorously and consistently implement charge and case management systems to focus resources and enforcement priorities. (This clearly in my judgment means strongly utilizing the *Priority Charge Handling Procedure* and focusing mainly on priority issues in Class A cases.

- Use administrative and litigation mechanisms to identify and attack discriminatory policies and other instances of systemic discrimination. (In my judgment, this means making class and systemic cases a priority whether by Commission Charges or using regular charges where possible).

2. **To prevent employment discrimination through education and outreach.** Under this Second Objective, the EEOC will continue to expand its education outreach efforts to:

   - Members of the public (i.e., potential charging parties) in order to help them understand and know their rights with respect to employment discrimination; and

   - Employers, unions and employment agencies in order to better address and resolve EEO issues, thereby creating more inclusive workplaces.

3. **To deliver excellent and consistent service through a skilled and diverse workforce and effective systems.** Under this Third Objective, the EEOC plans to strengthen the skills and improve the diversity of its workforce. This includes the development of more efficient, effective investigators and other employees, resulting in a high quality work product.

According to EEOC Chair, Jacqueline Berrien, a considerable number of comments were received in written form or in person at the February 18th hearing from individuals or groups suggesting which items should or should not be included in the SEP as priorities or strategies. The following comments by several very interested "stakeholders" are representative of the type of suggestions made.

- Former Chairman, Gilbert Casellas, stated, "There persists within the Commission an institutional conflict: whether to engage in strong, deterrent law enforcement through investigation and litigation or to provide technical assistance and other preventive tools to employers." Casellas strongly suggests that there must be a balance.

- Daniel Kohrman of the National Employment Lawyers Association (NELA) recommends that: "The EEOC should implement an agency-wide policy regarding the prompt sharing of the Respondent Position Statement with charging parties." According to Kohrman, this would facilitate case resolution one way or the other by allowing charging parties to have a realistic assessment of the strength of their cases. Actually, this is already being done. Kohrman's point is that it is not consistent in every District Office.

- David Burton, General Counsel of the National Small Business Administration, states: "The EEOC should focus its enforcement efforts where unlawful discrimination is an important problem. . . . It should not expend its resources

in areas where it is not an important problem." He believes that "two such areas are employer educational attainment requirements and criminal background checks."

Thus, in answer to the question of what employers should expect from the Commission's adoption of the new SEP in September, we would surmise that it will be nothing radically new directly to employers. However, there may be some major internal changes as to how the Commission operates. It is anticipated that charge processing times will be significantly reduced after the **Priority Charge Handling Procedure** is revamped and Class B and Class C charges are expedited through the system. It would be our guess that on an increasing basis the number of meritorious individual Class A and Class B charges will be referred to the private plaintiff's bar rather than being litigated by the EEOC. It is also our guess that the EEOC's enforcement and litigation efforts will more and more be focused on systemic discrimination in various industries. The question is: "Which industries? And which issues will be set as priorities?"

This office will continue its watch of SEP developments and keep you posted. If you have questions, please call 205.323.9267.

OSHA Tips: Interpreting OSHA Standards

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.

A very useful tool for an employer to ensure compliance with a particular OSHA standard may often be found in "interpretation letters" posted on the agency's website. A 2002 response to a request for clarification regarding how OSHA letters of interpretation affect regulations and standards prompted the following reply. "OSHA requirements are set by statute, standards, and regulations. Interpretation letters explain these requirements and how they apply to particular circumstances, but they cannot create additional employer obligations."

Examples of some of the more recent postings of OSHA replies to inquiries include the following:

The question was asked whether the BBP (Bloodborne pathogen) standard, 1910.1030, permitted employees to remove contaminated needles from caps/sheaths before disposing of the needles following medical or dental procedures. The answer given was as follows, "The standard strictly prohibits bending, recapping, or removal of contaminated sharps unless the employer can demonstrate that no alternative is feasible or that such action is required by a specific medical or dental procedure.

OSHA standards include many training requirements. This prompted the question as to whether it was OSHA's position that an instructor be present or available to answer questions online or by e-mail immediately. The answer was "no", but it was pointed out that there are different requirements in this regard. For example, 29 CFR 1910.120 calls for "actual field experience under the direct supervision of a trained, experienced operator." The powered industrial truck standard, 1910.178 requires a combination of formal instruction, practical training demonstrations by the trainer, and exercises by the trainee.

A question was posed as to whether all compressed gas cylinders (including empty ones) must be stored in an upright position. OSHA's answer is that compressed gas cylinders must be stored upright at all times except, if necessary, for short periods of time while cylinders are being hoisted of carried.

A number of questions, as in the following, have been asked with regard to the recording of injuries and illnesses. The question of recordability was raised where an employee, who suffered an allergic reaction to food provided while attending a meeting, was transported to a hospital and received treatment. OSHA references 1904.5(b)(2)(iv) in answering which states that an injury which is solely the result of an employee eating, drinking, or preparing food or drink for personal consumption is not considered work-related. It further states that this exception does not apply if the food is supplied by the

company and the employee contracts food poisoning, noting that an allergic reaction was involved here rather than food poisoning.

In another question, OSHA was asked whether an exercise regime directed by a Certified Athletic Trainer (ATC) would constitute "first aid" or "medical treatment" for OSHA recordkeeping purposes. OSHA replied as follows. "In general, if the ATC recommends exercise to an employee who exhibits any signs or symptoms of a work related injury, the case involves medical treatment and is a recordable case. In replying to this question OSHA goes on to state that it considers therapeutic exercise as a form of physical therapy which, along with chiropractic treatment, is considered medical treatment for OSHA recordkeeping purposes. It is also stated in their reply that the agency's listing of first aid treatments in 1904.7(b)(5)(ii)(M) is comprehensive, noting that " any treatment not included on this list is not considered first aid for OSHA recordkeeping purposes."

Wage and Hour Tips: Deductions from Employee's Pay

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As evidenced by the more than 7,000 lawsuits filed in 2011, Fair Labor Standards Act issues continue to be very much in the news. One of the areas where employers can get into trouble is making improper deductions from an employee's pay. Employers should take a closer look at what type of deductions can be legally made from an employee's pay.

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 401(k), U.S. Savings Bonds, IRAs, etc.; and
- 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, and also 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 allowed by a 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; and
- Disciplinary deductions. Exempt employees may be deducted for disciplinary suspensions of a full day or more made pursuant to a written policy applicable to all employees.

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 $9.00 per hour may be deducted $1.75 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 that no

deductions may be made in overtime weeks unless there is a prior agreement with the employee. Consequently, employers might want to consider having a written employment agreement allowing for such deductions in overtime weeks.

Another area that can create a problem for employers is that the law does not allow an employer to claim credit as wages money that is paid for something that is not required by the FLSA. In 2011, the U.S. Fifth Circuit Court of Appeals ruled in a case brought against Pepsi in Mississippi. A supervisor, who was laid off, filed a suit alleging that she was not exempt and thus was entitled to overtime compensation. The company argued that the severance pay the employee received at her termination exceeded the amount of overtime compensation that she would have been due. The U.S. District Court stated the severance pay could be used to offset the overtime that could have been due and dismissed the complaint. However, the Court of Appeals ruled that such payments were not wages and thus could not be used to offset the overtime compensation that could be due the employee. Therefore, employers should be aware that payments (such as vacation pay, sick pay, holiday pay, etc.) made to employees that are not required by the FLSA cannot be used to cover wages that are required by the FLSA.

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 or willful violations of the minimum wage provisions of the Fair Labor Standards Act. Thus, employers should be very careful to ensure that any deductions are permissible prior to making such deductions. Virtually every week, I see reports where employers have been required to pay large sums of back-wages to employees because they have failed to comply with the Fair Labor Standards Act.

On a different subject, I am sure several of you have government contracts that are subject to the McNamara-O'Hara Service Contracts Act. You should be aware that contracts, effective June 17, 2012 or afterward, will have increased health and welfare rates. The new rates are $3.71 per hour for all states except Hawaii, which mandates health insurance coverage and thus is allowed a reduced rate of $1.50 per hour.

As I mentioned a couple of months ago, there is a move to increase the minimum wage. Nearly every day, I see an article that either advocates an increase or one that puts forth the argument that an increase in the minimum wage would just increase unemployment without helping the low wage workers. However, I recently read some statistics that indicate the majority of minimum wage workers live in households with an annual income of less than $40,000. I am sure the arguments will continue throughout the election cycle so stay tuned.

2012 Upcoming Events

EFFECTIVE SUPERVISOR®

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 an employer's requirement that applicants arbitrate failure to hire claims was improperly worded and therefore unenforceable? *Gove v. Career Systems Dev. Corp.* (1st Cir. July 17, 2012). The employment application included an agreement for the applicant to arbitrate "all pre-employment disputes" according to the terms of the company's arbitration program. Gove checked the box where she accepted this arbitration provision at the time she applied. She was pregnant when she applied and she was not hired. She claimed it was due to her pregnancy and the employer asserted that the claim should be arbitrated. One of the reasons why the court rejected the claim is because the employer's use of the term "pre-employment" claim means that the individual had to have been hired in order for there to be a "pre-employment" issue to arbitrate. Someone who is rejected for employment does not have a "pre-employment" claim.

…that the United States Supreme Court will determine what authority a supervisor must have for a supervisor's harassing behavior to be imputed to its employer? The case, *Vance v. Ball State Univ.,* involved an individual who was in a supervisory capacity to direct an individual's work, but did not have power to hire, fire or affect pay or promotional opportunities. Accordingly, the question for the Supreme Court is whether an individual in such a position may act in a manner that makes his employer vicariously liable. If the individual is not considered a "supervisor" for purposes of harassment or discrimination compliance, then the individual's behavior is not imputed to the employer and the employer has affirmative defenses it may assert. The Supreme Court will hear the case this fall. It is an important one for employers, as the scope of a supervisor's responsibilities has changed during recent years where more supervisors are really coaches, while managers are more directly involved in disciplinary, promotion, and pay consideration decisions.

…that a Teamsters local has been sanctioned by a court for bringing an unnecessary appeal of the court's prior decision? *NLRB v. Teamsters Local Union No. 523* (10th Cir. July 5, 2012). The Board originally issued an order against the Teamsters when the Board had only two members. Based upon the Supreme Court's decision that a two-member board did not have such authority, the Tenth Circuit reversed the decision and the Board reissued the decision with the necessary three-member quorum. The Teamsters again appealed the Board decision, asserting that the Board did not have the authority to make its decision. The Court found the Teamsters' appeal to be frivolous and directed the Union to pay the employee who brought the claim against the Teamsters $4,000 in attorney fees and double the costs the employee incurred in defending the second appeal.

…that according to a survey by Jobvite, which is a web-based recruiting site, 92% of employers surveyed plan to use social media sites for recruiting, an all-time high. A similar survey in 2011 resulted in 87% of those surveyed stating that they were using social networking sites. Facebook is the most widely-used, from 55% in 2011 to 66% in 2012. Also, 54% of those surveyed in 2012 use Twitter to recruit, compared to 47% in 2011. According to Jobvite, "The rise in social recruiting has allowed both candidates and employers an easier way to find the best match. We continue to see social recruiting gain popularity because it is more efficient than the days of sifting through a haystack of resumes." The poll involved interviews with 1,000 human resources professionals throughout the country during May and June, 2012.

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