LEHR MIDDLEBROOKS VREELAND & THOMPSON, P.C.

Employment Law Bulletin

JULY 2018
VOLUME 26, ISSUE 7

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Conflicting Medical Opinions: Must Employee Return to Work?

Under the Americans with Disabilities Act, an employer desiring to break ties with an employee because of risks related to his disability must often show that the employee is a direct threat to harm himself, others, or company property. That an employee poses a direct threat is an affirmative legal defense, meaning the employer bears the significant burden of establishing the existence of the threat. The recent case of *Spencer-Martin v. Exxon Mobil Corp.* (M.D. La. June 15, 2018) is an excellent example of how an employer may successfully use the direct threat defense to the Americans with Disabilities Act.

Spencer-Martin worked as a control room operator at one of the company's chemical plants. The safety risks associated with control room operator functions are significant, including potential explosions, exposure, and any other number of outcomes which could cause death and serious injury. From 2010-2015, Spencer-Martin had occasional seizures outside of work. She was prescribed anti-seizure medication. She disclosed the medication, but not the seizures, to Exxon, describing the medication as preventative. In April 2015, she had a seizure at work. Her own neurologist then restricted her from driving and safety-sensitive work for six months. In October 2015, her neurologist released her to return to work without restrictions. Because of the employer's concern that she could have another seizure at work, the employer asked its Occupational Health staff physician, Dr. Burgess, to do an individualized assessment of whether Spencer-Martin posed a risk of harm. This assessment included reviewing Spencer-Martin's medical records, touring the unit where she worked, consulting with other doctors, and interviewing the employee. The employee acknowledged that if she became incapacitated due to a seizure, other employees could be at risk. Exxon concluded that she was a direct threat and did not allow her to return to safety-sensitive work. The company looked for other work for Spencer-Martin but could not find any work for which she was qualified.

Spencer-Martin sued, contending that she did not pose a direct threat, given that her neurologist had released her and challenging Dr. Burgess's opinion because he was not a board-certified neurologist and because her seizures were and had been relatively well-controlled and infrequent. The court rejected Spencer-Martin's ADA claim. The court noted that it is a violation of the ADA for an employer to have a "zero risk" policy regarding seizures, but that the employer did a thorough, individualized assessment that considered the duration of the risk, the potential harm that could occur, the likelihood of the harm and whether any potential harm was imminent.

According to the court, Spencer-Martin presented no evidence to show that she is not at risk for a seizure, even though she did not have a seizure for six months.

While on the subject of employee medical matters and safety at work, the case of *Mitchell v. U.S. Postal Service* involved an employee who suffered from depression and took an extensive leave of absence. He provided his employer with a doctor's note stating that he was able to return to work without restriction. However, the employer received a note from the employee's wife, stating that she thought the employee would suffer a mental breakdown if he returned to work. The wife's letter was accompanied by a letter from the employee himself, imploring his wife to write her letter. Accordingly, the employer placed the employee on leave and asked the employee to provide a note from his doctor addressing the concerns in his wife's letter. The employee refused and was terminated. The employee claimed it was due to disability discrimination, but on June 28, 2018, the Sixth Circuit Court of Appeals upheld the employer's decision.

Court of Appeals Reversal Refers to "MeToo" Factors

In the case of *Minarsky v. Susquehanna County, et al.* (July 3, 2018), the Third Circuit Court of Appeals ruled that a recipient of sexual harassment who did not report the behavior for years was not precluded from having a jury decide her case. The employee worked one day a week for the director of the County Department of Veteran's Affairs. Multiple times, the director massaged her shoulders, touched her face, and attempted to kiss her. He also sent her sexually explicit emails. This began when Minarsky was hired in 2009, but she did not report what she considered sexual harassment until 2013. During this time, the director also made inappropriate advances towards other women in the workplace, though he never received more than a verbal reprimand. When Minarsky formally reported her harassment, the employer responded promptly, conducted a thorough investigation, and terminated the perpetrator. The employee sued, but the employer sought to defend on the *Faragher-Ellerth* affirmative defense that (1) it had an effective anti-harassment policy in place and (2) by not reporting the harassment for four years, Minarsky unreasonably failed to use the policy. While the employer was successful before the district court, the Third Circuit rejected its arguments, finding that evidence of the director's pattern of behavior meant the employer was not entitled to assert the affirmative defense.

With respect to the first prong of the defense, the Court found that the employer could not establish that its anti-harassment policy was effective if the director essentially had free rein to give unwanted hugs and attempt to give unwanted kisses to female employees (some of them his own superiors).

As to the second prong, in finding that Minarsky had not acted unreasonably in delaying reporting the harassment, the court channeled the #MeToo movement. According to the court, "National news regarding a veritable firestorm of allegations of rampant sexual misconduct that has been closeted for years, not reported by victims [who] asserted a plausible fear of serious adverse consequences, had they spoken up at the time the conduct occurred." The court explained that Minarsky had a reasonable basis for not reporting the harassment, such as "her fear [the supervisor's] hostility on the day-to-day basis and retaliation by having her fired; her worry of being terminated by the Chief Clerk, and the futility of reporting, since others knew of [the supervisor's] conduct, yet it continued."

The significance of this case is that in this #MeToo climate, courts are receptive to victims asserting why they did not follow through with reporting under the employer's policies about sexual or other forms of harassment. A generalized fear of retaliation will be insufficient, according to the court. However, as in this case, where others knew of the perpetrator's behavior and did nothing, the court credited the recipient's interpretation of that to mean that reporting any such behavior would be futile.

Employer Eating Policies

No, this is not a joke. For years, employers have had policies to address alcohol, drugs, and a variety of other matters involving employee personal use or behavior. Now, some employers are addressing what employees may eat and when, and often employers have the right to

do that. Recently, an employer, We Work, announced a company policy prohibiting employees from eating meat at company functions or when taking customers out. The company stated that for those employees who travel, any consumption of meat will not be a reimbursable expense. An employer is usually required to reimburse employees for business expenses, such as meals incurred. However, even in that situation, the employer has the right to state that employees shall not consume meat (or other animal products) while on company business or expenses.

No doubt, someone could raise some type of a theory of employer restrictions on what employees may eat as having a discriminatory effect on some protected group. However, as employers continue to focus on employee wellness, employers generally have the right to state that just as an employee may not consume alcohol in conjunction with company business or when reimbursed by the company, employers may also do the same regarding foods employees consume.

Effort for Predictive Scheduling Expands

Chicago is the latest city to consider an ordinance requiring predictive scheduling at the workplace. Due in part to efforts by the United Food and Commercial Workers, Chicago Jobs with Justice, and the Service Employees International Union, predictive scheduling ordinances focus primarily on restaurant and retail industries, but also include non-hospitality employers.

Chicago's predictive scheduling ordinance would require the following:

1. Provide the employee with a written estimate of the employee's work schedule, average number of hours worked per week, whether he or she will be on call, changes to shifts and overtime.

2. Give employees at least 14 days' notice of a change in their shift.

3. If employees do not receive the 14-day notice, they may decline to work the new shift without adverse consequences.

4. If the employees' shift is changed with less than 24 hours' notice, the employee will receive an additional hour of pay for each hour of a predictable schedule which has been changed.

5. Provide an employee with the right to decline work unless the employee has had 11 hours free and clear of work between shifts.

6. Offer employees more hours of work before considering the use of temporary employees or outside contractors.

Similar ordinances have already passed in New York, San Francisco, and Seattle. The trend is an outcome of scheduling practices that primarily occur in restaurant and hospitality industries, where an hourly and daily fluctuations of customer levels mean employee schedules may be cut or added to with little notice. Predictive scheduling is also an area of focus for organized labor in these industries, so that individuals can have some basis for understanding what their pay will be on a range on a week-to-week basis.

Rising Concerns for Employers with Distracted Drivers

There are many industries that require their employees to drive either their own vehicles or company-owned vehicles as a part of their job duties. With the rise of smartphones and the ability to do multiple things while driving, drivers, employers, and state legislatures have grown more and more concerned with distracted drivers. Currently, 16 states have banned the use of a handheld cell phone while driving. Generally, these laws prohibit a driver from physically holding a cell phone; writing, sending, or reading text-based communications; watching a video or movie; or recording a broadcast while driving. Essentially, the laws only allow drivers to make and receive phone calls in a hands-free manner. While some drivers might find these laws intrusive, the National Highway Traffic Safety Administration finds these laws warranted. For example, in 2016, distracted driving caused approximately 3,450 deaths.

Employers face a heightened risk of liability when their employees drive distracted. When a distracted driver causes an accident and harms others as a result of their own distracted driving, it is highly common for victims to not only sue the driver, but also the driver's employer. The rise of lawsuits and jury awards against employers for their employees' distracted driving is causing employers to undergo serious efforts to address and prevent districted driving by their employees.

Ultimately, the first step in combating distracted driving by employees is to develop a safe driving policy that outlines the dos and don'ts of mobile device use and other driving distractions and impairments. Formal, written, and consistently enforced policies will aid in mitigating your liability as an employer and protecting the safety of your employees and other drivers on the road. Employers should be specific as to what is prohibited and permitted while operating a vehicle on company business and what the consequences will be if the employee violates the policy. Employers also need to communicate the policy to employees early and often, and have supervisors ensure that employees fully understand the policy.

At the most basic level, these policies should reflect any state law regulations on distracted driving. Even if your state does not have such a law in place, the easiest way to protect yourself and your employees is to prohibit use of mobile phones while driving on company business, driving in company-provided vehicles, or when making any work-related communications. Many policies that prohibit all cell phone use, hands-free or not, allow employees to first find a safe place to park their vehicle before initiating or responding to any calls, text messages, or emails. Employers also require employees to program devices to send automatic responses from their cell phones to respond to calls or text messages while the employee is driving. Employers may also require or provide hands-free technology (like Bluetooth), but some research indicates that even hands-free communication can result in distracted driving. Some policies also extend their cell phone use prohibition to all work-related activities, including after-hours or work-sponsored events.

Because our cell phones will only become smarter and will continue to provide us with instant communication and entertainment, this issue is not going away. If you do not have a safe driving policy in place, now is the time to create one. While businesses and their lawyers are always concerned with mitigating liability, safety is the paramount concern, and this is a first step all employers can take.

Miscellaneous NLRB Topics

This article was prepared by Frank F. Rox, Jr., NLRB Consultant for the law firm of Lehr Middlebrooks Vreeland & Thompson, P.C. Prior to working with the firm, 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 404.312.4755.

NLRB Maintains ULP Finding Against Employer That Altered Benefits Because Of Union Activity

Despite being told to rethink its original decision in *800 River Road Operating Co, LLC d/b/a Woodcrest Health Care Center v. NLRB* (3rd Cir. 2015), the NLRB maintained its position that Woodcrest withheld benefits to employees mulling unionization. Specifically, Woodcrest made favorable changes to its health insurance plan during a period of union organization. It announced those changes to employees not in the contemplated bargaining unit. It told employees who were choosing to unionize or not that it could not discuss or bargain benefits with them. The Board found that since the election-eligible employees would have received improved benefits but for the union election, there was an unfair labor practice. The Third Circuit remanded the case and told the Board that it would instead need to determine if the employer had a discriminatory motive at heart. On remand, the Board considered motive and decided that the union activity was indeed the motivating factor for Woodcrest's decision to withhold benefits to certain employees. Remember the rule, you are required to treat employees the same as if there was no union activity at all.

Trump's Executive Orders Limiting Official Union Time Under Attack

Thirteen unions representing public sector unions have sued President Trump in an attempt to invalidate three executive orders designed to reform the civil service

system. The orders make it easier to fire incompetent civil servants, streamline the collective bargaining process, and limit the amount of time employees can use official union time to represent employees. The complaint, arguing that the executive orders are unconstitutional, state partially that

> [President] Trump has no authority to issue these executive orders from either the Constitution itself or from Congress. To the degree the President has the authority [to issue these orders], portions of the executive orders are plainly unlawful as they conflict with or seek to rewrite portions of the FSLMR Statute, without authority from Congress. Therefore, the executive orders must be declared invalid and a permanent injunction must be issued to prohibit their implementation. Employees must now fear whether they are putting their jobs in jeopardy by exceeding the amount of official time where it is legal under the law and the appropriate collective bargaining agreement.

However laudable reform is (and it is certainly needed), I do not expect these executive orders to stand, at least in the lower courts. Region 10 frequently dealt with a postal worker job steward who did no work at all – he merely filed for official time off to process grievances. In my opinion, there is something wrong with the process.

Fiscal Year 2018 Budget Frozen at 2017 Levels

In what can only be described as a fluid situation, the negotiations involving the NLRB budget are not clear. President Trump originally proposed a six percent reduction in funding for FY 2018. While the Agency's workload is projected to actually increase in 2018, attrition would insure that the NLRB mission would be handled by 1,320 employees, rather than the 1,596 employees carried in FY 2017. In late March 2018, the Senate passed a budget for freezing the NLRB budget at 2017 levels. What seems clear is that in FY 2019, starting in October of 2018, the Agency is looking to cut personnel. It is well known that the NLRB budget is mostly comprised of personnel costs. Hence, General Counsel Robb's interest in consolidating Regional offices and/or busting from SES Regional Directors, which GC Robb has denied considering (See last month's LMVT Employment Law Bulletin). The NLRB and General Counsel Robb have not announced how they plan to deal with the anticipated budget cuts – through layoffs, early retirements, consolidation of Regions, or other means.

In a Victory for the Union, the Postal Service Cannot Make the Union Translate a Draft Contract

According to the NLRB, the Postal Service cannot force the Teamsters Union to partially pay for the contract proposal's translation to English. The Board reversed the administrative law judge and found that translation was a permissive subject of bargaining and cannot be bargained to impasse. The dispute stems from the UPS 2015 request that the Tronquistas Local 901 translate its bargaining proposal from Spanish to English. The Union refused this request and before calling off negotiations, the UPS counter-offered to split the cost of translation to English, which the Union also rejected. The NLRB considers both mandatory subjects, which can be bargained to impasse, and permissive subjects, which cannot be bargained, to impasse. To state it simply, mandatory subjects typically involve wages, hours, and working conditions that are contractual terms, whereas permissive subjects are bargained at the parties' discretion and involve things that are not included in a contract, like bargaining ground rules and union bylaws. The administrative law judge concluded that the instant subject was mandatory because the Postal Service could not understand the Teamster proposal in Spanish. The NLRB overruled him, finding that the evidence did not support UPS's contention that it could negotiate only in English and that Board precedent held that translation was not a mandatory subject of bargaining. *UPS Supply Chain Solutions, Inc.* (June 18, 2018).

NLRB Administrative Law Judge Rejects Settlement Deal in the McDonald's Joint-Employer Case

On July 17, 2018, an NLRB ALJ rejected a settlement that would have ended the case against corporate McDonald's. The litigation has been ongoing for a number of years, but the informal agreement to not hold the corporate entity responsible for franchisee's unfair labor practices has been called inadequate. The Judge stated that the settlement lacks "certain fundamental

elements […] and that it's virtually guarantee[d] the settlement wouldn't end the case and that the deal's narrow scope doesn't match up with the stakes presented by the multi-year suit." Administrative Law Judge Lauren Esposito went on to state that "the [General Counsel's proffered statements in support of] the informal settlements' [contain] significant shortcomings [that] are inadequate and inconsistent with board policy and practice… As a result, the motions to approve the settlement agreements in this case are denied." Clearly, the Trump administration supports the settlement. Do not be surprised if the General Counsel Peter Robb and McDonald's appeals the administrative law judge's ruling to the full Board in Washington D.C. Look for the settlements to ultimately be approved by the NLRB.

Boeing Micro-Unit Drama Continues.

In *Boeing*, 10-RC-251858, and discussed extensively in last month's Employment Law Bulletin, the petition in a smaller, micro, bargaining unit was found appropriate by the Regional Director for Region 10 on May 21, 2018. The union won the election and the certification was issued in mid-June of 2018. Boeing will refuse to bargain, to test certification, and has also filed a Request for Review of the finding of the appropriateness of the smaller unit. The employer filed a motion to stay the proceeding, which the Board denied right before the election. I do not expect the Board Request for Review on Appeal to be successful. Relief, if at all, will have to come from the Circuit Court. Stay tuned for developments in this case.

Pitfalls of Zero Tolerance Policies

This article was prepared by JW Furman, EEO Consultant Investigator, Mediator and Arbitrator for the law firm of Lehr Middlebrooks Vreeland & Thompson, P.C. Prior to working with the firm, Ms. Furman was a Mediator and Investigator for 17 years with the Birmingham District Office of the U.S. Equal Employment Opportunity Commission (EEOC). Ms. Furman has also served as an Arbitrator and Hearing Officer in labor and employment matters. Ms. Furman can be reached at 205.323.9275.

Zero tolerance policies are a good thing, right? Because of the many workplace misconduct scandals that have become public in recent months, employers are taking harder looks at how they handle allegations of harassment, from addressing complaints to carrying out discipline for offenders. At first glance, zero tolerance might seem to be the easiest and most efficient way of dealing with such a problem. And, while this may be the right way to go for your company, it is worth looking deeper before you decide.

The first thing that should be determined is exactly what "zero tolerance" means in your company. Will it truly be the one-size-fits-all method it sounds like? Will telling an off-color joke in the break room result in the same immediate termination that sexual assault would? Your policy needs to clearly state what conduct will not be tolerated.

Without that clear definition of what the company has zero tolerance for, employees will live in fear that they will be fired on the spot for any minor slip-up or comment that is misinterpreted by a coworker. Having employees who will not communicate with one another is not an atmosphere that promotes productivity or longevity. It will encourage some employees not to report behavior that should be reported. They may be experiencing or witnessing behavior that should be stopped but will allow it to continue because they do not believe it to be severe enough to cost someone their job. Or they may not want to be known by coworkers as the one who ruined their friend's career. There is always the off-chance that an employee will have such an intense personal dislike for another employee that they will embellish (or lie about) that person's conduct for the purpose of getting them fired.

EEOC's anti-harassment task force offered some guidance in 2016 regarding zero tolerance policies. It cautioned that the term "zero-tolerance" could be misleading and counterproductive without being properly defined. It encouraged employers to have no tolerance for abusive or harassing behavior by holding employees accountable for their behavior and assuring that resulting actions are prompt and "proportionate to the offensiveness of the conduct." And, as always, the policies must be enforced consistently.

Zero tolerance policies can, and should, recognize that all offenses are not equal – circumstances of the alleged violation, seriousness of the allegations and histories of the individuals involved should all be considered. As with all reports of harassment, investigations need to explore the severity and pervasiveness of the conduct. Even if the conduct does not rise to the level of unlawful harassment, inappropriate conduct has negative effects on the workforce. And, if it is not stopped, it can escalate to unlawful harassment.

It is important to make sure that zero tolerance policies apply to everyone at every level of the company. Managers and supervisors need to understand that they are in positions of trust and leadership and will be held accountable for their actions. When employees see their leaders acting unprofessionally or ignoring company policies, the message they receive is that such behavior is acceptable – or encouraged – by their employers.

Wage and Hour Tips: The Motor Carrier Exemption under the Fair Labor Standards Act

This article was prepared by Lyndel L. Erwin, Wage and Hour Consultant for the law firm of Lehr Middlebrooks Vreeland & Thompson, P.C. Prior to working with the firm, 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. Mr. Erwin can be reached at 205.323.9272.

As I prepare this article, Wage Hour still does not have an Administrator. Ms. Cheryl Stanton, who is currently the Executive Director of the South Carolina Department of Employment and Workforce was nominated for the position in September 2017. However, that nomination was returned to the President in January 2018 by the Senate. It is not known when or if another person will be nominated for the position.

Although there have been some changes in the way that Wage Hour operates since the new administration took over, they have not been drastic. One change is that now the Wage Hour Administrator has begun issuing opinion letters. First, they reissued several letters that were withdrawn in early 2009 by the previous administration, and recently they have also issued a couple of new letters. Just this month, they also issued a new position paper concerning joint employment of household domestic workers. All these documents are available on the Wage Hour website.

For the past several years, Wage Hour has used strategic enforcement in certain targeted industries. In recent years, those industries included agriculture, day care, restaurants, garment manufacturing, guard services, health care, hotels and motels, janitorial and temporary help. Although they may not specifically target these industries, as long as I have been involved in Wage Hour enforcement, they have always devoted significant resources to “low wage” industries. Thus, I expect that Wage Hour will continue to spend a lot of enforcement time in these areas.

Previously, I have discussed the application of Motor Carrier exemption, but I continue to see where employers are facing litigation regarding the proper application of the exemption. As there have been some changes in the criteria for the overtime exemption, I thought I should provide an updated overview to the requirements. Section 13(b)(1) of the FLSA provides an overtime exemption for employees who are within the authority of the Secretary of Transportation to establish qualifications and maximum hours of service pursuant to Section 204 of the Motor Carrier Act of 1935, except those employees covered by the small vehicle exception described below.

Thus, the 13(b)(1) overtime exemption applies to employees who are:

1. Employed by a motor carrier or motor private carrier;

2. drivers, driver’s helpers, loaders, or mechanics whose duties affect the safety of operation of motor vehicles in transportation on public highways in interstate or foreign commerce; and

3. not covered by the small vehicle exception.

The driver, driver's helper, loader, or mechanic's duties must include the performance of safety-affecting activities on a motor vehicle used in transportation on public highways, in interstate, or foreign commerce. This includes transporting goods that are on an interstate journey even though the employee many not actually cross a state line. Further, safety affecting employees who have not made an actual interstate trip may still meet the duties requirement of the exemption if the employee could, in the regular course of employment, reasonably have been expected to make an interstate journey or could have worked on the motor vehicle in such a way as to be safety-affecting. An employee can also be exempt for a four-month period beginning with the date they could have been called upon to, or actually did, engage in the carrier's interstate activities.

In 2007, Congress inserted a Small Vehicle Exception to the application of the overtime exemption, which severely limits the exemption, especially for small delivery vehicles, such as vans and SUVs. This provision covers employees whose work, in part or in whole, is that of a driver, driver's helper, loader or mechanic affecting the safety of operation of motor vehicles weighing 10,000 pounds or less in transportation on public highways, in interstate, or foreign commerce, except vehicles**:**

(a) Designed or used to transport more than 8 passengers (including the driver) for compensation; or

(b) designed or used to transport more than 15 passengers (including the driver), and not used to transport passengers for compensation; or

(c) used in transporting hazardous materials, requiring placarding under regulations prescribed by the Secretary of Transportation.

Due to the Small Vehicle Exception the Section 13(b)(1) exemption does not apply to an employee in any workweek when the employee performs duties related to the safety of small vehicles, even though the employee's duties may also affect the safety of operation of motor vehicles weighing greater than 10,000 pounds [or other vehicles listed in subsections (a), (b) and (c) above] in the same work week. For example, a mechanic who normally spends his time repairing large vehicles works on a vehicle weighing less than 10,000 pounds is not exempt in any week that he works on the small vehicle. When determining whether the vehicle meets the 10,000 pounds requirement, a U. S. District Court in Missouri, confirming Wage Hour's position, ruled that if a vehicle is pulling a trailer, you consider the combined weight of both the vehicle and the trailer to apply the exemption.

The Section 13(b)(1) overtime exemption also does not apply to employees not engaged in "safety affecting activities," such as dispatchers, office personnel, those who unload vehicles, or those who load but are not responsible for the proper loading of the vehicle. Only drivers, drivers' helpers, loaders who are responsible for proper loading, and mechanics working directly on motor vehicles to be used in transporting in interstate commerce can be exempt from the overtime provisions of the FLSA under Section 13(b)(1). Further, the overtime exemption does not apply to employees of non-carriers, such as commercial garages, firms maintaining and repairing motor vehicles owned and operated by carriers, or firms leasing and renting motor vehicles to carriers.

Employers that operate motor vehicles should carefully review how they pay drivers, drivers helpers, loaders, and mechanics to make sure they are paid in compliance with the FLSA. Failure to do so can result in liability. If I can be of assistance, please give me a call.

2018 Upcoming Events

2018 Employee Relations Summit

Birmingham - November 15, 2018
McWane Center
200 19th St N, Birmingham, AL 35203
www.mcwane.org

Registration Fee – Complimentary

For more information about Lehr Middlebrooks Vreeland & Thompson, P.C. upcoming events, please visit our website at www.lehrmiddlebrooks.com or contact Alana Ford at 205.323.9271 or aford@lehrmiddlebrooks.com.

Open to the Public

15th Annual Northeast Alabama Human Resources and Manufacturing Conference
August 15, 2018
Northeast Alabama Community College
138 Alabama Highway 35
Rainsville, Alabama 35986
Contact Nancy Griggs to register.

In the News

Pregnancy Related Bathroom Breaks

We have mentioned before that although pregnancy in general is not considered a disability (but we'll leave it to you to tell that to someone who is in her seventh, eighth, or ninth month of pregnancy in the deep south during July and August), we see the gradual movement of the law in the direction of treating pregnancy-related matters as conditions for which ADA-like accommodations should be provided or as outright disabilities under the ADA. For example, in the recent case of *Wadley v. Kiddie Academy International, Inc*. (E.D. Pa. June 19, 2018), an employee was terminated because she left the classroom too often for pregnancy-related restroom breaks. She provided her employer with a doctor's note that due to her propensity for urinary tract infections when pregnant, she needed to use the restroom frequently. She and other employees often did not have additional employee support in the classroom – there was one employee per classroom. She usually was able to obtain coverage for when she needed to use the restroom, but ultimately her employer terminated her because she used the restroom too often compared the number of breaks otherwise permitted. She sued, alleging sex discrimination and disability discrimination. The court rejected her sex discrimination claim, stating that she failed to show that male employees received more favorable treatment. However, the court allowed her ADA claim to proceed, based on evidence that the employee submitted that she had a pregnancy-related proclivity for urinary tract infections and that those infections could spread to the kidneys, causing miscarriage, early labor, or low birth weight, and therefore it qualified as a disability under the ADA.

ADA Facilities Lawsuits Hit Record Numbers

Although overall employment discrimination charges and litigation has declined, ADA Title III access lawsuits have increased substantially. For the first six months of 2018, a total of 4,965 lawsuits were filed, compared to 7,663 lawsuits for the entire year of 2017. Thus far, this projects to a total of 10,000 ADA Title III lawsuits this year, a 30% increase from last year. These lawsuits allege that a place of public accommodation failed to provide accessible parking, entrance, egress, and use of facilities for individuals with disabilities. While many of these suits are focused on physical obstructions to wheelchair access, an increasing number center on website inaccessibility. From January 1 through June 30, 2018, 1,053 website access lawsuits were filed, compared to 814 during all of 2017. States that lead the way with Title III access lawsuits are California and Florida.

Union Representation for Drug Testing?

For several years, a unionized employee has had the right to ask for the presence of union representation when that employee is interviewed as part of an investigation where the investigation's results may lead to the discipline or discharge of that employee. This is known as an employee's *Weingarten* rights. The case of *Fred Meyer Stores, Inc.* (July 2, 2018), involved the NLRB's consideration of a *Weingarten* request when an employee was required to submit to a drug test. Two customers smelled alcohol on a cashier's breath and they reported it. The employee was interviewed by the management team, during which time the employee requested the presence of union representation. The employer held off

on further interview of the employee, but the employee was unsuccessful in trying to reach several different union representatives to participate in the meeting. After approximately 20 minutes of waiting for the employee to find union representation, the employer directed the employee to submit to an alcohol/drug test. The employee refused to do so without the presence of a union steward, and therefore, was ultimately suspended. An administrative law judge ruled that the employer did not violate the National Labor Relations Act. The judge stated that the requirement for the alcohol/drug test was "time sensitive" and the employer provided the employee several opportunities to secure the presence of a union steward.

DOL (Finally) Drops Ill-Advised Persuader Rule

Perhaps you recall that in 2016, the Obama administration proposed requiring employers to report consultant (attorney) activity, where a direct or indirect result of that activity related to whether employees should join a union. In essence, the DOL rule would eviscerate the attorney-client privilege concerning advice for a union-free outcome. It would even cover an attorney reviewing an employer's handbook to be sure that it complied with the National Labor Relations Act in several areas, such as no solicitation and no property access. A federal district court in 2016 issued a nationwide injunction to enjoin the Department of Labor with proceeding with this rule. On July 17, 2018, the Trump Administration Department of Labor rescinded the 2016 Persuader Rule. The effect of this rescission is to protect the attorney-client privilege when attorneys provide clients with advice and training regarding lawful compliance with workplace communications regarding unions.

FMLA and Third-Party Administrators

It is not unusual for Human Resource professionals to jump at the opportunity to outsource FMLA administration. We get it. The question becomes to what level an employer may hold an employee accountable for complying with the requirements of communication with the third-party provider. In the case of *IBEW Local 1600 v. PPL Electric Utility Corporation* (E.D. Pa. Dec. 22, 2017), employees were instructed to notify their supervisor and the third-party FMLA administrator if they were calling off for something that may be covered by the FMLA. Even though the employee knew to call the FMLA administrator, the employee told her supervisor that she needed to leave early for FMLA reasons. She did not call the FMLA administrator. Her request for approved FMLA leave was denied, because she did not follow the process. Her absence was treated as unexcused. In ruling for the employer, the court stated that requiring an employee to notify a third party FMLA administrator was not an undue burden and would not discourage employees from taking unforeseeable leave under the FMLA. Remember: you have the right to hold an employee accountable to follow call-in and notification procedures, regardless of whether you use a third-party FMLA administrator. If it's a situation where it was simply impossible for the employee to do so, such as due to a severe accident or circumstance, be reasonable in considering that. But otherwise, an employer has the right to treat an FMLA absence as unexcused if the employee does not comply with the employer's process.

LEHR MIDDLEBROOKS
VREELAND & THOMPSON, P.C.

Richard I. Lehr 205.323.9260
rlehr@lehrmiddlebrooks.com

David J. Middlebrooks 205.323.9262
dmiddlebrooks@lehrmiddlebrooks.com

Albert L. Vreeland, II 205.323.9266
avreeland@lehrmiddlebrooks.com

Michael L. Thompson 205.323.9278
mthompson@lehrmiddlebrooks.com

Whitney R. Brown 205.323.9274
wbrown@lehrmiddlebrooks.com

Claire F. Martin 205.323.9279
cmartin@lehrmiddlebrooks.com

Lyndel L. Erwin 205.323.9272
(Wage and Hour and Government Contracts Consultant) lerwin@lehrmiddlebrooks.com

Jerome C. Rose 205.323.9267
(EEO Consultant) jrose@lehrmiddlebrooks.com

Frank F. Rox, Jr. 404.312.4755
(NLRB Consultant) frox@lehrmiddlebrooks.com

JW Furman 205.323.9275
(Investigator, Mediator & Arbitrator) jfurman@lehrmiddlebrooks.com