VEDDER PRICE

Labor Law

A newsletter designed to keep clients and other friends informed on labor and employment law matters

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Questions or comments concerning the Newsletter or its contents may be directed to any of its Board of Editors: Paul F. Gleeson, James S. Petrie (312/609-7660), John J. Jacobsen (312/609-7680), Bruce R. Alper (312/609-7890), or the firm's Labor Practice Leader, Edward C. Jepson (312/609-7582), or in New York, Alan M. Koral (212/407-7750).

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Vol. 17, No. 1
March 1997

EEOC PROVIDES GUIDANCE FOR COMPLYING WITH THE ADA AND WORKERS' COMPENSATION LAWS

In response to employer uncertainty about the interaction between the Americans with Disabilities Act (the "ADA") and state workers' compensation laws, the Equal Employment Opportunity Commission (the "EEOC") recently released an Enforcement Guidance entitled "Workers' Compensation and the ADA." EEOC pronouncements are not binding on the courts but are generally considered to provide useful guidance.

Cautioning employers that workers' compensation concerns do not supersede ADA mandates, the Guidance comments on the ADA with respect to the following workers' compensation-related issues:

- whether occupationally injured individuals are

"disabled" for ADA purposes;

- hiring individuals with histories of occupational injury;
- return to work decisions;
- reasonable accommodation for individuals with disability-related occupational injuries;
- light duty issues;
- questions and medical examinations regarding occupational injury and workers' compensation claims; and
- exclusive remedy provisions in workers' compensation laws.

Topics of particular interest are discussed below.

Occupational Injury as a Disability

Individuals who qualify for workers' compensation benefits are not necessarily protected by the ADA. Instead, they are entitled to the ADA protection, including reasonable accommodation, only if they have ADA-defined disabilities. (The ADA defines "disability" as a physical or mental impairment that substantially limits a major life activity, a record of such an impairment, or being regarded as having such an impairment.) An occupational injury may not be permanent or severe enough to constitute an ADA-covered disability.

Refusal to Hire

An employer cannot refuse to hire ADA-covered applicants because they pose an increased risk of occupational injury and workers' compensation costs, with one exception: an employer can reject an individual whose employment poses a "direct threat." The employer must demonstrate that such an applicant poses a significant risk of substantial harm to the health or safety of himself or herself or others that cannot be controlled by reasonable accommodation. According to a federal district court in the Northern District of Illinois, however, the direct threat defense applies only where there is a risk of harm to individuals other than the applicant. *Kohnke v. Delta*

Airlines 932 F. Supp. 1110 (N.D. Ill. 1996).

In determining whether a direct threat of harm exists, many factors regarding a prior occupational injury should be considered, including whether the prior position involved hazards not present in the position under consideration and whether reasonable accommodation can reduce the risk of harm.

Return to Work

An employer cannot require an employee with a disability-related occupational injury to return only to "full duty." Rather, a return must be permitted when the employee can perform the essential functions of the job.

Similarly, an employer cannot refuse to return an employee with a disability-related occupational injury simply because of a workers' compensation determination of "permanent" or "total" disability. "Such a determination is never dispositive regarding an individual's ability to return to work although it may provide relevant evidence regarding an employee's ability to perform the essential functions of the position in question or to return to work without posing a direct threat," according to the EEOC.

Reasonable Accommodation

Employers must provide reasonable accommodation for individuals with ADA-covered occupational disabilities. A workers' compensation vocational rehabilitation program does not necessarily satisfy an employer's duty to provide reasonable accommodation. Instead, employers must accommodate an ADA-covered employee in his or her current position through job restructuring or some other modification. If this would impose an undue hardship or would be impossible, then the employer must consider reassigning the employee to a vacant, equivalent position (or lower-level position if an equivalent one is unavailable).

Light Duty

An employer is not required to *create* "light duty" positions for injured employees. But the EEOC warns that creating light duty jobs for occupationally injured employees (and not nonoccupationally injured employees) is prohibited if it has an adverse impact on a class of

individuals with disabilities, unless the distinction is justified by a job-related reason consistent with business necessity. Moreover, if the only effective reasonable accommodation is to restructure the employee's position by redistributing marginal functions so that the restructured position resembles the light duty position, the employer must provide this accommodation absent undue hardship.

If an employer has only temporary light duty positions, the employer does not have to transform those positions into permanent ones.

Confidentiality of Workers' Comp Information

The ADA confidentiality requirement applies to medical information regarding an applicant's or employee's workers' compensation claim. The information must be kept on separate forms maintained in a separate medical file along with other information required to be kept confidential under the ADA.

The ADA prohibits disclosure of such information except in limited circumstances, such as to state workers' compensation offices, state second injury funds and workers' compensation insurance carriers in accordance with state workers' compensation laws. Supervisors may be informed of necessary restrictions on an employee's work duties and about necessary accommodations.

Conclusion

While the EEOC's Guidance seeks to clarify an employer's obligations when the ADA and workers' compensation-related issues intersect, these issues are still being defined by the courts. It is up to employers and their counsel to determine what is "reasonable" accommodation in each case.

If you have questions about the EEOC Enforcement Guidance, or about the ADA in general, contact Vedder Price (312/609-7500).

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TERMINATION OF PHYSICIAN'S HOSPITAL

STAFF PRIVILEGES NOT COVERED BY TITLE VII

The U.S. Court of Appeals in Chicago recently held that Title VII does not cover a hospital's decision to terminate the medical staff privileges of a physician who was not employed by the hospital.

In *Alexander v. Rush North Shore Medical Center*, 1996 WL 678627 (Nov. 25, 1996), the plaintiff, an Egyptian-born Muslim, was an anesthesiologist with staff privileges at, but not employed by, Rush North Shore Hospital. He had his own professional corporation through which he billed his patients and paid taxes; was not required to admit his patients at Rush; and received no compensation, benefits or private office space from Rush. However, as a condition of his privileges, Plaintiff was required to spend a certain amount of time on call and come to the hospital if summoned in an emergency.

The case arose when Plaintiff allegedly failed to respond to an emergency room request to come to the hospital while he was on call. Plaintiff claimed it was all a misunderstanding, but the hospital ultimately terminated his staff privileges for violating the on-call policy. Plaintiff then sued under Title VII alleging discrimination based on his religion and national origin.

Rush argued that it could not be liable under Title VII because it did not employ the Plaintiff. The district court rejected that argument, finding that Plaintiff should be allowed to prove his allegations that Rush's termination of his privileges discriminatorily interfered with his relationship with his patients. The case eventually went to trial and Rush won on the merits. Plaintiff appealed.

On appeal, the Seventh Circuit did not reach the merits. Instead, the Court affirmed on the ground that Title VII does not cover persons who have independent contractor rather than employment relationships with the defendant-employer. In so doing the Court reversed its own 1986 decision holding that a doctor not employed by a hospital can still sue under Title VII on the theory that the hospital's termination of staff privileges interferes with the doctor's present or future economic opportunities. Now rejecting that theory, the Court said the controlling issue is whether the physician has an employment relationship with the hospital.

Seventh Circuit Court of Appeals: Title VII does not cover persons who have independent contractor rather than employment relationships.

Applying the common law test for determining independent contractor status, the court considered the extent of the employer's control and supervision over the worker; the kind of occupation and skill required; who bears responsibility for the equipment, supplies, fees and workplace; the method and form of payment; and length of job commitment. When applying those criteria in *Alexander,* the court found that the doctor was not Rush's employee.

In addition to hospitals, this decision should provide additional protection from Title VII suits for decisions made by accrediting and trade organizations which may take actions that can affect an individual's occupational opportunities.

If you have any questions about the *Alexander* case, or Title VII coverage in general, call Bruce Alper (312-609-7890) or any other Vedder Price attorney with whom you have worked.

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LESSONS FROM THE TEXACO CASE

The aftershocks of the Texaco case have employers everywhere asking, "What went wrong, and how can we prevent this from happening at our company?" Texaco recently agreed to pay over $176 million to settle a class action lawsuit in which over 1,500 of its current and former employees alleged that Texaco systematically discriminated against minorities and denied them promotions. The settlement, believed to be the largest employment discrimination settlement in U.S. history, came just 11 days after audio tapes surfaced in which high-level Texaco executives were heard allegedly belittling minorities and discussing the destruction of documents requested by the plaintiffs in discovery.

The revelation of the Texaco tapes led to swift public

reaction and calls for a boycott of Texaco by numerous civil rights groups, including the NAACP, the Urban League and the Leadership Conference on Civil Rights — an umbrella organization of over 180 civil rights groups. In the days following release of the tapes, Texaco's stock lost $1 billion of its market value while the stock market was otherwise setting record highs. Some large institutional shareholders expressed concerns and demanded a full accounting of the matter from Texaco's chairman. In the wake of this pressure, the Company quickly agreed to settle the case after having fought it for two years. The proposed settlement calls for $115 million to be paid to the 1,500 current and former employees who sued, $26.1 million in pay raises over the next five years for minority employees and $35 million for sensitivity and diversity training programs.

Could Texaco have avoided this? From the outside, the corporate giant appeared to be doing everything right. All requisite equal employment opportunity policies were in place and had been disseminated to all employees company-wide. Employee complaint procedures were in place and were well-publicized to employees. Employees had been required to attend numerous diversity and sensitivity training programs over the years. The Company even conducted periodic surveys of its employees in which they could anonymously report complaints and provide feedback on diversity and equal employment opportunity issues. What else could it have done?

It may be that nothing could have reversed the tide of public opinion set in motion by the initial media reports. For example, when tape augmentation suggested that many of the executives' comments were not necessarily racist, this development received far less media coverage than the initial reports on the tapes. But one lesson that might be learned is that it is not enough for a company simply to put equal employment policies and procedures in place and assume that all is well. While these are important elements of a complete equal employment opportunity program, it is equally important that the company follow through and continuously monitor the program to see whether it is actually effective.

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> *assume that all is well…The company must follow through and continuously monitor the program to see whether it is actually effective.*

In addition, the implementation and auditing should stem from a single source at the top of the corporate hierarchy. In Texaco's case, responsibility for equal employment matters and compliance was pushed down to over three dozen separate divisions. There was no centralized oversight or auditing of the divisions or their respective equal employment opportunity programs to ensure that they were effective. Indeed, in sworn testimony, Texaco's Vice President of Human Resources stated that he was unaware of any periodic or systematic way in which top Texaco officials would know whether the Company was in compliance with equal employment opportunity laws, absent being told by the government. The same executive also testified that the Company's top officials were not even told when government auditors arrived at the Company's business units to examine compliance with employment laws.

Thus, the Texaco case can provide an incentive to companies across the country to evaluate their own equal employment opportunity programs to ensure that they are complete and effective. Such a program could include the following items:

- ✍ Development of a comprehensive set of written equal employment opportunity policies.
- ✍ Dissemination and publication of those policies to all employees, including supervisors, managers, and executives.
- ✍ Small group sessions in which the company's policies are explained and employees' questions are answered.
- ✍ Ongoing training programs that include information on the prohibitions and remedies of federal, state and local laws, discussions of the company's policies and procedures, and explanations of the types of conduct that will not be tolerated by the company.

- Separate training and education of supervisors, managers and executives in which the importance of their own adherence to the equal employment opportunity program is stressed. Practical considerations can be useful, such as explaining how workplace discrimination can adversely impact productivity, employee morale and recruiting.

- Making equal employment opportunity compliance part of supervisors', managers' and executives' performance reviews and linking compensation to compliance and achievement in their respective areas of responsibility.

- Assigning oversight of the equal employment opportunity program to a central department or executive with the backing of top management.

- Monitoring of disciplinary actions and employee complaints with an eye to possible patterns of discrimination.

If you have questions about how to create and maintain an effective equal employment opportunity program or how to conduct internal audits of your existing program, call Tom Wilde (312/609-7821) or any other Vedder Price attorney with whom you have worked.

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APPEALS COURT SAYS CANCELLED CONTRACT TRIGGERS WARN ACT EXCEPTION

The Worker Adjustment and Retraining Notification ("WARN") Act requires 60 days' notice to affected employees of a plant closing or mass layoff. However, an exception exists if the closing or layoff is caused by unforeseeable business circumstances. WARN Act regulations provide that the circumstances must be caused by a sudden, dramatic and unexpected action or condition outside the employer's control, and that foreseeability is a matter of the employer's reasonable business judgment in predicting its market demands.

In January 1991, McDonnell Douglas terminated several thousand employees within a week or two of learning that

the U.S. Navy had cancelled its contract for development of the A-12 fighter-bomber. Plaintiff workers sued alleging inadequate notice under WARN. McDonnell Douglas claimed unforeseeable business circumstances. Plaintiffs countered that McDonnell Douglas had anticipated contract cancellation in a December 20 memo advising employees that the A-12 program was in danger and that cancellation could require massive layoffs.

The trial court found for McDonnell Douglas, holding that plaintiffs had received notice as soon as practicable after the contract cancellation. The Eighth Circuit Court of Appeals affirmed.

The appellate court noted evidence that the A-12 program had fallen on "rocky times" in 1990 because of scheduling delays, structural defects, cost overruns and dissatisfaction with contractor performance, and that in hindsight the "death knell" began to sound in December. However, the program had been given high priority, defense officials considered it imperative to national security, and the government had rarely in the past cancelled a program it considered essential. Recent contract negotiations had been upbeat, leading an under secretary of defense to declare that the government had no intention of cancelling.

"In this setting," wrote the Court, "the commercial reasonableness of McDonnell Douglas's reluctance to issue WARN notices…is manifest." In the Court's opinion, termination of the A-12 program did not become reasonably foreseeable before cancellation of the contract. (*Loehrer v. McDonnell Douglas Corp.*, CA 8, No. 95-3964, 10/22/96.)

If you have any questions about the *McDonnell Douglas* case, or the WARN Act in general, call Jim Petrie (312-609-7660) or any other Vedder Price attorney with whom you have worked.

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BENEFIT PLANS

Does Your Benefit Plan Cover Independent Contractors? (You Might Be Surprised)

About Vedder Price

Vedder, Price, Kaufman & Kammholz is a national, full-service law firm with 180 attorneys in Chicago, New York City and Livingston, New Jersey. The firm combines broad, diversified legal experience with particular strengths in labor and

Employers continue to restructure their work forces to adapt to changing economic conditions. In making these changes, benefit plan language must be kept in mind. This is particularly true in cases of individuals who perform many of the same tasks as other employees but are hired as independent contractors.

A 1992 decision by the U.S. Supreme Court, *Nationwide Mutual Ins. Co. v. Darden*, held that ERISA's statutory definition of "employee" should be interpreted by reference to the common law agency principles distinguishing independent contractors from common law employees.

A recent Ninth Circuit case has raised this issue again in the context of plan language. In *Vizcaino v. Microsoft Corporation*, the Ninth Circuit Court of Appeals reviewed a situation where the plan covered only "regular, full-time employees." Microsoft had earlier resolved an IRS inquiry on payroll taxes by agreeing to pay employee withholding taxes for certain individuals who had been treated as independent contractors, thus reclassifying them as common law employees. When that decision became public, eight of those individuals filed a lawsuit claiming they were also entitled to participate in Microsoft's employee benefit plans.

Substantial evidence (including written agreements) existed that the individuals had agreed to be, and considered themselves to be, independent contractors not entitled to benefits. But the plan administrator interpreted the benefit plans to exclude them without interpreting certain plan language that became the focal point on appeal. The Court interpreted that unexamined language for itself and concluded that the individuals were not excluded from the plans.

One judge dissented from the Court's opinion (a dissent with which we agree), and recently the Ninth Circuit itself has agreed to review this decision. Yet, no matter what the outcome in this case, the most important lesson for other companies lies in the consequences that can occur if a formal decision interpreting plan terms is made by a court rather than by the plan administrator.

Contrast the *Microsoft* decision with a Seventh Circuit decision (issued less than three months later) on the same question, *Trombetta v. Cragin Federal Bank for Savings*

employment law and litigation, employee benefits and executive compensation law, occupational safety and health, public sector and school law, general litigation, corporate and business law, commercial finance and financial institutions, environmental law, securities and investment management, tax, real estate, intellectual property, estate planning and administration, and health care, trade and professional association, and not-for-profit law.

Vedder, Price, Kaufman & Kammholz
A Partnership including Vedder, Price, Kaufman & Kammholz, P.C.

Chicago
222 North LaSalle Street
Chicago, Illinois 60601
312/609-7500
Facsimile: 312/609-5005

New York
805 Third Avenue
New York, New York 10022
212/407-7700
Facsimile: 212/407-7799

New Jersey
354 Eisenhower Parkway
Plaza II
Livingston, New Jersey 07039
973/597-1100
Facsimile: 973/597-9607

102 F.2d 1435 (7th Cir. 1996), in which Vedder Price represented the plan administrator.

The *Trombetta* case involved loan originators who had similarly signed agreements confirming their independent contractor status. However, after the bank was sold, the value of bank stock in the bank's ESOP plan reflected a substantial increase in value. The loan originators sued, claiming they should have participated in the ESOP all along. In *Trombetta*, however, the record showed that the plan administrator had examined all the arguments put forth by the loan originators. In addition, it had carefully reviewed all the facts and circumstances and all the relevant plan language in reaching its conclusion that the loan originators were in fact independent contractors not eligible to participate in the ESOP.

Reviewing that record, the Seventh Circuit held that the abuse of discretion standard applied to the plan administrator's decision. Thus, the Court was not required to interpret the plan language itself. Further, the administrator's decision satisfied the abuse of discretion standard. Thus, the thoroughness of the plan administrator's actions was a key element in protecting its decision.

These cases suggest some practical steps that can be taken by all plan administrators with regard to this issue:

- Review plan language from time to time. Make sure that it continues to reflect workforce composition and that it accurately describes who is intended to be included in the plan.

- When questions of coverage arise, make sure the appropriate plan fiduciary makes a careful and reasoned decision interpreting the plan, considering all potentially relevant facts and plan language.

When Must a Prospective Benefit Change Be Disclosed to Employees Who Inquire? The "Serious Consideration" Rule

We have emphasized before the importance courts place on the maintenance of thorough records documenting benefit plan changes. You should always maintain a paper trail showing the procedures used to amend the plan so that it's clear what the plan language was at any given

point in time.

But what about inquiries based on rumors about plan changes that have not yet occurred? In a world of work force restructuring and frequent plan changes, more courts have examined whether upcoming plan changes have to be disclosed even before adoption. Generally, if no one asks, benefit changes should only be disclosed following their adoption. This bright-line rule has support and hopefully will be adopted by other courts. *See, Pocchia v. NYNEX Corp.*, 81 F.3d 275 (2d Cir. 1996). But the law is unsettled regarding how to respond to employee inquiries *before* changes are adopted. At least some courts have held that a plan fiduciary must, if asked, disclose a plan change that is under "serious consideration." Still, courts adopting this approach are hard pressed to define what constitutes "serious consideration" (a term that does not appear in ERISA).

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Two recent cases illustrate the difficulty as courts grapple with this issue. First, in *Fischer v. Philadelphia Electric Co.*, 96 F.3d 1533 (3d Cir. 1996), the court had to determine when a company began seriously considering an early retirement plan. Employees who retired shortly before an enhanced retirement option was introduced sued for the additional benefit, claiming they were misled into retiring too soon. The court said that the test for "serious consideration" was to determine when a company "focuses on a particular plan for a particular purpose." It then undertook a factual examination to pick the date when "serious consideration" began, concluding that the trial court picked a date that was too early.

In a similar case (decided less than three months later), *Muse v. IBM*, 103 F.3d 490 (6th Cir. 1996), the court held that serious consideration of a change exists when a "specific proposal is being discussed *for purposes of implementation* by senior management with the authority to implement the change." (Emphasis added.) Here the court found no misrepresentation had occurred after the "serious consideration" date. This test should make it easier for employers to accurately determine when

"serious consideration" begins.

Although this issue remains unsettled, plan administrators can take some protective steps:

- New benefit changes that are under consideration should follow a set procedure of progressive levels so that a designation can be made of which level of consideration constitutes "serious consideration."
- Carefully formulate replies for employee inquiries after that point to ensure that they are not materially "misleading."

If you have questions about any benefit plan matters, contact John Jacobsen (312/609-7680) or any other Vedder Price attorney with whom you have worked.

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ODDs & Ends

Another Employer "Joke" Lays an Egg

At a gathering to familiarize employees with a new company motto, an employer put on a skit featuring the explorers Lewis and Clark, and their Native American guide, Sacajawea. The company's CEO played the part of Sacajawea, dressed in a pull-over shirt down to his knees, "showing hairy legs and large shoes." He also wore heavy rouge and blacked out most of his teeth. This burlesque supplied enough evidence of discriminatory animus, in the eyes of a Pennsylvania federal district court, to make the employer's subsequent termination of a half-Native American employee a Title VII violation, particularly in light of the fact that the employee's manager had helped create the skit.

Who Says the Rest of Us Can Afford It?

Last December, the federal courts' policy-making body issued a report arguing that U.S. judiciary employees should continue to remain exempt from Title VII, ADA, ADEA, FMLA, FLSA and six other federal employment laws that apply to private-sector employers and the federal executive and legislative branches. Pointing out that the

federal judiciary must be independent of the other two branches, the U.S. Judicial Conference also argued that the federal courts could not afford to pay their employees overtime and to modify their buildings to comply with ADA's accessibility requirements. Senator Charles Grassley of Iowa criticized the report, saying, "This seems to indicate that the judiciary believes that its work is more important than the work of any other American business or branch of government."

Vegetarian Bus Driver Gets a Load of Lettuce

Last issue in this column, we reported that the EEOC had cited the Orange County (California) Transit Authority for firing a vegetarian bus driver because he refused to hand his fares promotional coupons for free hamburgers. On November 20, 1996, the bus driver's attorney announced that the Transit Authority had settled the employee's religious discrimination suit for $50,000.

Another Update: Casino Mime's Complaint Silenced

In an earlier column (Vol. 16, No. 1) we reported that Kelbi Folkerson, a strolling mechanical doll mime, had won the right to proceed to trial against the Circus Circus Hotel & Casino after she was fired for hitting a casino patron in the mouth. The mime claimed her discharge constituted retaliation for opposing sex discrimination (the patron had looked like he was going to hug Ms. Folkerson). On February 21, 1997, the Ninth Circuit Court of Appeals affirmed a grant of summary judgment for Circus Circus (the casino's second try) on the grounds that the customer's actions couldn't be imputed to the employer in this case.

Sex Discrimination Victim Gets $610,000 (This Victim's a Male)

Last November, a federal jury awarded the former CFO of a Maine hospital $610,000 in compensatory and punitive damages on his Title VII sex discrimination claim. (These damages are subject to a statutory $200,000 cap, but the plaintiff's attorney estimates that further computations of back and front pay and attorneys' fees, both exempt from the cap, could push the total to $1.3 million.) The fired executive alleged that the hospital's female president and board chairwoman had established an "anti-male" atmosphere and had fired him under a double standard for

evaluating men and women. The plaintiff's lawyer said that "people thought I was crazy" taking a sex discrimination case on behalf of a male. Apparently the jury didn't agree.

Phony E-Mail Evidence Lands Harassment Claimant in Jail

After Adelyn Lee was fired by Oracle Corp., a California software firm, she filed sexual harassment charges against Oracle and the Company's CEO. She got a settlement for $100,000 to drop the charges. But the company was troubled by one of Ms. Lee's pieces of evidence — an e-mail message from a company vice-president to the CEO stating that Lee had been fired "per your request." The vice-president claimed he never sent such a message. The company referred the matter to California prosecutors. On January 28, after a three-week trial, a San Mateo, California jury convicted Ms. Lee of falsifying the electronic-mail message to obtain the settlement. Pending sentencing, Ms. Lee was ordered jailed in lieu of $100,000 bond (after the court refused to allow her to use her settlement money for the bail).

"Ransom" Offends Machinists Union

In the recent Disney fiction-based movie "Ransom," Mel Gibson plays an airline company owner who once paid a $250,000 bribe to a corrupt "machinists union" official to head off a strike. The International Association of Machinists, which represents numerous airline industry employees, asked Disney to eliminate references to the union from the movie. When the references remained in, the Machinists sued Disney studios and the "Ransom" screenwriters for defamation in Maryland state court. Besides giving away part of the plot line, the union is asking for $200 million in damages.

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