VEDDER PRICE

Labor Law

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

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ADA UPDATE – NARROWING THE SCOPE OF ADA CLAIMS

During the past summer, the Supreme Court issued a series of decisions that drastically altered the landscape of disability discrimination law. The effects of these

decisions are now being felt as courts reexamine *who* is able to invoke the protections afforded by the Americans with Disabilities Act (ADA). Additionally, significant decisions interpreting other aspects of the ADA indicate that the bar is being raised for plaintiffs pursuing disability discrimination claims.

Fewer Individuals Able to Make Claims

The Supreme Court, in *Sutton v. United Airlines, Inc.*, provided the long-awaited answer to the question of whether mitigating measures, such as medication, are to be considered in determining if an employee is "disabled" for ADA purposes. In light of the Court's answer in the affirmative, employers now stand a better chance of prevailing in cases that prior to *Sutton* would have been significantly more problematic.

For example, in *Todd v. Academy Corp.*, a federal district court in Texas granted summary judgment to a retailer that terminated an employee with epilepsy. Todd had suffered from epilepsy since childhood, and, although he took medication to control his epilepsy, he continued to have light seizures once a week, which usually lasted only a few seconds. While employed by Academy, Todd suffered approximately eight seizures. After the first seizure, he met with his managers, who assured him that his condition was not a problem for the company. Several months later, Todd was absent from work for four consecutive days. Although he notified his supervisor each day of his illness, his employment was terminated for having exhausted his supply of sick leave.

Without delving into the legitimacy of Academy's stated nondiscriminatory reason for termination, the court granted summary judgment in favor of the employer, finding that Todd was not disabled – with medication he was not substantially limited in a major life activity. The court acknowledged that under a pre-*Sutton* analysis, epilepsy would have a "nearly automatic" ADA protection; however, employing the analysis required under *Sutton* the court found that the momentary physical limitations Todd experienced could not be classified as substantial.

In *Hill v. Kansas City Area Transportation Authority*, the Eighth Circuit Court of Appeals upheld a lower court's decision granting summary judgment to KCATA, finding

that hypertension (high blood pressure) was not a disability, and stressing that employees must take affirmative steps to address conditions that may impact their employment.

Hill had worked as a bus driver for KCATA for a number of years, during which time she effectively treated her condition with medication. In 1995, Hill injured her knee and a transit authority physician prescribed pain medication. Sometime later, she was found asleep on her bus before beginning her route. She was advised that a second such offense would result in her termination. Hill made no mention of any problems caused by her medications. After suffering a sprained wrist, Hill was given another prescription for pain medication. Once again, she was found sleeping on her bus. This time, however, she claimed that her drowsiness was caused by the interaction of her pain and hypertension drugs and requested that the KCATA send her to a doctor. Her request was rejected and her employment terminated.

The court cited two grounds on which dismissal of Hill's claim was proper. First, it found that Hill's hypertension was not a covered disability. Relying on the Supreme Court's opinion in *Murphy v. United Parcel Service* (a companion case to *Sutton*), the court explained that Hill's hypertension could not be considered a disability because, when medicated, her high blood pressure did not substantially limit any major life activities. Second, the court found that Hill's request for a medical examination was untimely – it occurred *after* she committed a dischargeable offense. Noting that employees are responsible for their own health, the court chastised Hill for ignoring her problem until her work performance warranted discharge. Hill, according to the court, "did not request a disability accommodation, she asked for a second chance to better control her treatable medical condition…[and] that is not a cause of action under the ADA."

Those Who Make Claims Must Carry Their Share of the Burden

In *Pond v. Michelin North America, Inc.*, the Seventh Circuit ruled that a disabled union employee with seniority rights may not bump a junior employee from a different job as an accommodation under the ADA. After contracting Hepatitis-C, Pond was unable to return to her

regular position. While she was off work on disability leave, Pond and Michelin jointly identified a position she could perform despite her medical restrictions. Rather than pursue her bumping rights under the collective bargaining agreement, Pond requested a transfer to this position; however, because no positions were open, Michelin refused to transfer her. When Pond failed to return to work after her leave expired, her employment was terminated.

Addressing Pond's claim, the court acknowledged that employers are obligated to reassign a disabled employee to a vacant position when that employee is no longer able to perform the essential functions of her employment and is qualified for the vacant position. However, it is the plaintiff's burden to show that a vacant position exists for which he or she is qualified. In this case, there was no vacancy, and the fact that Pond had the right to bump another employee under the terms of the collective bargaining agreement did not create a vacancy for purposes of reasonable accommodation under the ADA.

Upholding a district court's grant of summary judgment to an employer, the Fifth Circuit Court of Appeals reaffirmed that an employee must actively participate in efforts to determine whether a reasonable accommodation exists for her disability. In *Loulseged v. Akzo Nobel, Inc.*, the plaintiff worked as a lab technician in a chemical plant. Although the majority of her duties involved testing chemicals, she was required to fill and transport containers – some weighing as much as 50 pounds – on a rotating basis. After suffering a back injury, Loulseged was unable to handle the rotational fill/transport responsibilities. Akzo accommodated her limitations by permitting her (and the other technicians) to rely on maintenance workers to assist with these duties. At some point, however, Akzo announced that the maintenance workers would no longer be available to assist the technicians – including Loulseged. During a meeting with the technicians, a company representative indicated that a "tricycle" could be made available to the technicians to assist with transport duties. Loulseged did not respond to this suggestion and never spoke to anyone at the company about needing an accommodation. One week before she was to resume rotational duties, she submitted a letter of resignation in which she complained of the unprofessional atmosphere in the lab, but made no reference to her disability or the accommodation of it.

Loulseged argued that Akzo violated the ADA when it failed to engage in an adequate interactive process to determine what accommodations were necessary. Rejecting this argument, the Fifth Circuit concluded that Loulseged, not Akzo, refused to take part in the process. Addressing Loulseged's assertion that Akzo acted unilaterally in suggesting use of a "tricycle", the court instructed that "no matter how earnestly one party attempts to engage in the interactive process, its efforts can always be superficially characterized as unilateral if the other party refuses to interact." Putting it more bluntly, the court opined that "[o]ne cannot negotiate with a brick wall." The court concluded that Loulseged's silence and premature resignation robbed Akzo of an opportunity to complete the process and demonstrate its good faith. In addition, the court explained that by quitting when she did, Loulseged was unable to question the adequacy of the accommodation proposed by the company.

If you have any questions about ADA issues, please call Barry Hartstein (312/609-7745), Aaron Gelb (312/609-7844) or any other Vedder Price attorney with whom you have worked.

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FMLA REGULATIONS UNDER ATTACK

For most employers, complying with the more than 100 pages in regulations implementing the Family and Medical Leave Act ("FMLA") has been frustratingly difficult. However, when confronted with litigation, an increasing number of employers are fighting back by challenging the regulations themselves. In a series of recent decisions, including one in which Vedder Price represented the employer, federal courts have invalidated or limited portions of the FMLA regulations.

The successful challenges to date have involved two different provisions of the FMLA regulations. The first requires employers to notify employees that they are not eligible for FMLA leave; the second requires employers to designate qualifying absences as FMLA leave in writing.

Deemed Eligibility

Generally, to be eligible for FMLA leave, an employee must have worked for the employer for at least 12 months and have worked at least 1,250 hours in the preceding 12 months. However, Section 825.110 of the regulations states that if an employee who is *not eligible* for FMLA leave notifies the employer of the need for family or medical leave, the employer must advise the employee, ordinarily within two business days, that he or she is not eligible for FMLA leave. This requirement applies even if the employee does not mention the FMLA. According to the regulations, if the employer fails to inform the employee that he or she is not eligible, the employee "will be deemed to be eligible" and entitled to all the protections of the FMLA, including 12 weeks of job-protected leave.

In *Wolke v. Dreadnought Marine, Inc*., the plaintiff had been employed with the company for only seven months when he injured his back and was unable to work. The company terminated Wolke's group health insurance coverage a month later, and Wolke sued, alleging the employer's actions violated his right to continued group health insurance coverage during any period of FMLA leave. The company claimed that Wolke had not been employed for 12 months and, therefore, was not eligible for FMLA leave. Wolke countered that the employer was estopped from raising his ineligibility because it failed to inform him of that ineligibility when his absence began, as required by the regulations.

The Federal District Court for the Eastern District of Virginia rejected Wolke's claim, holding that the portion of the regulations upon which Wolke relied, Section 825.110, is invalid because it contradicts Congress' intent to restrict the class of employees eligible for FMLA to those who met the 12 month/1,250 hour standard specified in the Act.

Designation of Leave

The second provision of the regulations successfully challenged, Section 825.208, also imposes a notice obligation on covered employers. Under this section, if an employer knows that an employee's paid leave is due to an FMLA qualifying reason, the employer must timely notify the employee in writing that the absence is being designated as FMLA leave. If it fails to do so, the leave

may not be counted toward the employee's annual 12-week FMLA leave entitlement.

In *McGregor v. Autozone*, Alicia Cox, a store manager, took 15 weeks off when she gave birth, receiving short-term disability benefits during the first 13 weeks of her absence. When she returned to work, she was not restored to the store manager position, but instead was reassigned to an assistant manager job. Cox sued, claiming that the FMLA entitled her to reinstatement to the position she held when her leave began.

The company argued that Cox was not entitled to reinstatement because she had not returned to work at the conclusion of the 12 weeks of leave to which she was entitled under the FMLA. Relying on Section 825.208, Cox responded that because Autozone had never told her that the leave was being counted against her FMLA leave entitlement, she was entitled to 13 weeks of paid disability leave *and* another 12 weeks of unpaid job-protected FMLA leave thereafter.

The Eleventh Circuit rejected Cox's position and held that the portion of the regulations upon which she relied was invalid and unenforceable. The court explained that Section 825.208 impermissibly converts the statute's federally mandated leave entitlement into an additional 12 weeks of leave unless the employer specifically notifies the employee that she is using FMLA leave. Since only the regulations – and not the FMLA itself – contain such a notice provision, the court stated that the regulation not only adds requirements and grants entitlements beyond those of the statute, but also is inconsistent with the FMLA's stated purpose of balancing the demands of the workplace with the needs of families "in a manner that accommodates the legitimate interests of employers."

A number of courts have followed the logic of *McGregor*; however, at least one federal district court in Ohio has rejected a challenge to the validity of Section 825.208. *See Miller v. Defiance Metal Products.*

Some courts have declined to address the validity of Section 825.208, opting instead to limit its application and interpretation. For example, in the unpublished decision *Covucci v. Service Merchandise Co.*, Covucci was placed on a leave of absence after suffering an injury at work. The leave was classified as a worker's compensation leave and

not as an FMLA leave. After being on leave for almost a year, Covucci's employment was terminated for failing to provide medical documentation to substantiate the last several months of his leave. He filed suit, alleging, among other things, that he had been denied his 12 weeks of FMLA leave.

In reviewing a lower court's grant of summary judgment in favor of Service Merchandise, the Sixth Circuit Court of Appeals found that, despite the fact that his leave had not been designated an FMLA leave, Covucci had received all of his substantive rights under the FMLA. The court noted that while Service Merchandise committed a technical violation of the FMLA regulations, it would be an "egregious elevation of form over substance to allow Covucci an additional twelve weeks of leave."

Similarly, in *Donnellan v. New York City Transit Authority*, the District Court for the Southern District of New York found that the Transit Authority's failure to designate an employee's leave as FMLA leave did not entitle that employee to an additional 12 weeks of leave. Declining to rule on the validity of Section 825.208, the Court relied on *Covucci* and found that, although Donnellan claimed she had been denied 12 weeks of FMLA leave, the only thing she had been denied was the labeling of her leave as FMLA leave.

Impact of Decisions

Significantly, the courts have not invalidated the FMLA regulations as a whole, but rather only two particular provisions to date. Furthermore, all of the decisions are limited in the geographic scope of their application to the federal judicial district or circuit in which they were decided. Accordingly, employers should continue their efforts to fully comply with both the statute and the regulations. However, when an inadvertent violation of the regulations occurs, and an employer is confronted with an unreasonable demand or a lawsuit, these cases may provide a basis for the dismissal of a threatened or pending lawsuit and thereby strengthen the employer's hand in any negotiations.

If you have any questions about these cases or other FMLA issues, please call Tom Hancuch (312/609-7824) or any other Vedder Price attorney with whom you have worked.

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COMMON ACTORS: A PRESUMPTION OF NON-DISCRIMINATION MAY APPLY TO YOU

Employers often wonder how a recently hired employee can sue a company, claiming the very people who hired him discriminated against him in terminating his employment. Why would an employer hire an individual in a protected class, (*i.e.* age, race, sex, disability, etc.) if it intended to discriminate against that person? Fortunately, many courts – including the Seventh Circuit – presume that an employer would not act in this fashion and recognize what is referred to as the "common actor" or "same actor" defense. This defense may be invoked when an employee in a protected class is hired and fired by the same decision-maker in a short span of time.

In *Roberts v. Separators, Inc.*, the Seventh Circuit affirmed the district court's grant of summary judgment on behalf of Separators, Inc., holding that the plaintiff failed to show his employer's reason for terminating him – his poor attitude – was a pretext for discrimination. The plaintiff, age 61, was hired in October 1994 as a machinist. The shop foreman interviewed and made the decision to hire Roberts. Initially, he appeared to be a fine employee and at his three-month review received an excellent rating and a raise. One year after hire, Roberts took a vacation. Upon his return, he was notified that another machinist (who was younger) had been hired and that he was terminated because of his poor attitude. The Company gave Roberts a letter that stated he was not being terminated for misconduct.

Judge Flaum, writing for the Court of Appeals, explained that a presumption of nondiscrimination arises in cases where the plaintiff is hired and fired by the same individual within a relatively brief time period: "[i]t is highly doubtful that a person who hires an employee in the protected age group…would fire that same employee…as a result of a sudden 'aversion to older people.'" Because

the Shop Foreman had participated in both the hiring and firing decisions, the Company was entitled to this presumption of nondiscrimination. The Court noted, however, that the presumption may be rebutted if the plaintiff can present evidence which sufficiently undermines the employer's stated reason for the challenged employment action.

In an effort to overcome the common actor presumption, Roberts pointed to the letter he received when terminated, arguing that the claim of poor attitude was undermined by the Company's letter acknowledging that he had not engaged in misconduct. Branding this argument as "too great a reach," the Court pointed out that "misconduct" connotes official impropriety or wrongful behavior, while a "bad attitude" ordinarily signifies petulance or recalcitrance. The Court concluded that Roberts' argument "strained credulity" and was not enough to overcome the common actor presumption. Significantly, the Court also found that the single positive performance evaluation – particularly since it was issued 10 months prior to termination – was insufficient to sustain a finding of pretext in the face of the presumption.

If you have any questions about the common actor defense, or wish to review the discipline or termination of a protected-class employee, please call Jim Spizzo (312/609-7705), Aaron Gelb (312/609-7844), or any other Vedder Price attorney with whom you have worked.

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SHOW ME THE MONEY – SHOW ME THE DOOR: INTERNAL WAGE AND HOUR COMPLAINTS CAN LEAD THE WAY TO RETALIATION LAWSUITS

By now, most employers are well aware that an employee who complains to human resources about perceived harassment and/or discrimination enjoys the protection of anti-retaliation provisions found in state and federal fair

employment laws. Now, an increasing number of federal courts recognize a similar protection for employees who lodge internal complaints about wage and hour violations under the Fair Labor Standards Act (FLSA).

In *Valerio v. Putnam Associates, Inc.*, the First Circuit Court of Appeals held that the anti-retaliation provisions of the FLSA protect employees who pursue internal complaints with their employers, not just those who file formal complaints with state and federal agencies. The plaintiff was hired by Putnam as a receptionist/administrative assistant in October, 1994. At the time she was hired, Valerio was told that she was classified as an exempt employee under the FLSA and would not be entitled to overtime pay.

In August 1995, Valerio began attending law school at night. Shortly thereafter, and in response to a supervisor's reprimand, Valerio advised her supervisor that, according to the FLSA, she was improperly classified as an exempt employee, and demanded that she be reclassified as non-exempt. In addition, she warned that she was considering filing a complaint with the Department of Labor and that any retaliatory action would likely violate the FLSA. Undaunted, Putnam terminated Valerio's employment, claiming that a new network modem had eliminated the need for her position. The company did, however, issue her a final paycheck that included the amount she was entitled to as overtime wages.

The district court granted summary judgment for Putnam, finding that Valerio's internal complaint could not be considered a protected activity under either the FLSA or Massachusetts law. The Court of Appeals rejected this narrow reading of the FLSA and noted that if the Act protected only those employees who kept secret their complaint, it would discourage prior discussion of the matter between employers and employees and, additionally, would create an incentive for employers to terminate employees as soon as possible after learning that the employee intended to file a formal complaint.

In so ruling, the First Circuit joined the Sixth, Eighth, Tenth and Eleventh Circuits in upholding a more expansive reading of the FLSA. Only the Second and Ninth Circuits have specifically limited the FLSA's prohibition against retaliation to employees who file a formal complaint with a court or agency.

If you have questions about how to respond to an internal or a formal employee complaint, or how to handle the unrelated discipline or termination of an employee who has made such a wage and hour complaint, please call Jim Spizzo (312/609-7705), Aaron Gelb (312/609-7844) or any other Vedder Price attorney with whom you have worked.

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THE IMPACT OF PUNITIVE DAMAGES IN DISCRIMINATION CASES

As reported in the July issue of this Newsletter, in *Kolstad v. American Dental Association*, the Supreme Court clarified the standards for imposing punitive damages against an employer in discrimination cases. It held that a plaintiff must only show that the employer acted with "malice" or "reckless indifference" to be eligible for punitive damages. It further held, however, that an employer can avoid punitive damages by showing it made a good-faith attempt to comply with Title VII. The Court suggested that an anti-discrimination policy could help insulate employers from punitive damages, since it would prevent the plaintiff from showing either an intent to violate, or a reckless disregard of the possibility of violating, Title VII.

Following *Kolstad*, several courts have awarded punitive damages to employees even in cases where the employer had an anti-discrimination policy in place. While such a policy is necessary for every employer, these cases show that having an anti-discrimination policy will not immunize an employer against punitive damage awards where that policy is not properly implemented.

In *Equal Employment Opportunity Commission v. Wal-Mart*, the employer hired a hearing-impaired employee with the knowledge that he would need an interpreter on certain occasions. During a training session, the employee refused to view a training video that was not closed-captioned and for which an interpreter was not provided.

The next day, the store manager transferred him to a job the employee viewed as a demotion. He requested an interpreter to explain the reason for his transfer, but was refused. When he threatened to file a complaint with the EEOC, the store manager suspended him. A week later, the manager provided an interpreter and met with the employee to discuss the transfer. When the employee refused the transfer, he was terminated.

After a jury trial, the employee was awarded both compensatory and punitive damages. Wal-Mart appealed, arguing that its preparation and dissemination of an ADA compliance manual should defeat the imposition of punitive damages. The Tenth Circuit U.S. Court of Appeals rejected Wal-Mart's argument and found that, although the Company maintained a written policy against discrimination, the mere existence of such a policy was not enough. At trial, the employee's supervisor had testified she was not aware, until three years after the employee's termination, of any law requiring employers to make reasonable accommodations, and she never received any training about disability discrimination. The personnel manager also had testified that, in her seven years as a Wal-Mart manager, she had never received any training in employment discrimination or the requirements of the ADA, and didn't even have a copy of the Wal-Mart ADA handbook. Thus, the existence of an anti-discrimination policy was not sufficient to demonstrate a good-faith effort on the part of Wal-Mart.

In *Deffenbaugh-Williams v. Wal-Mart*, a white female involved in an interracial relationship alleged that her supervisor's failure to rebut the statement that she would "never move up with the company being associated with a black man," his pretextual disciplinary actions and his decision to terminate her on fabricated grounds constituted race discrimination. Consistent with signs posted in the store that encouraged employees with grievances to contact higher management, the plaintiff complained about the racial statement and the discipline to her regional manager, who told her that interracial dating "was not a problem" and said he would look into it; however, he never contacted her again.

At trial, the jury awarded both compensatory and punitive damages. On appeal, Wal-Mart raised the "good-faith effort" defense as a bar to punitive damages. The court rejected this argument, noting that Wal-Mart's policy of

encouraging employees to seek redress from upper management does not suffice to establish a good faith effort of requiring its managers to obey Title VII. Thus, punitive damages were appropriate.

In *Knowlton v. Teltrust Phones, Inc.*, the Tenth Circuit applied the *Kolstad* standards in a sexual harassment suit. The plaintiff alleged that she had been subjected to her supervisor's sexually harassing conduct throughout the duration of her employment. Such conduct included sexually explicit conversations and actions. The supervisor also propositioned her and refused to approve contracts she had obtained unless she would agree to perform oral sex. When the plaintiff complained to Teltrust's management, the supervisor was transferred to another position within the company. Fearing that she would still have to interact with him, plaintiff resigned and filed a sexual harassment claim.

Although the trial court granted Teltrust's motion for directed verdict on punitive damages, the Tenth Circuit reversed, finding that the evidence showed management knew of the supervisor's inappropriate interaction with female coworkers and was "unmistakably aware" that the environment was rife with foul language, sexual innuendo and sexual advances that could reasonably be labeled as sexual harassment. Thus, notwithstanding the existence of a sexual harassment policy, a jury could reasonably infer that Teltrust acted recklessly and with disregard for plaintiff's federally protected civil rights.

These cases demonstrate that an employer may find itself liable for punitive damages even where its conduct was not egregiously discriminatory and where it had an anti-discrimination policy in place. What *Kolstad* and its progeny teach is that the key to avoiding punitive damage liability is to: 1) adopt a strong anti-discrimination policy; 2) educate all employees on the policy, especially those whose duties can be said to be in any way "managerial"; and, 3) implement a method of effectively responding to and enforcing the policy.

If you have any questions about *Kolstad*, or punitive damages in employment cases in general, please call Barry Hartstein (312/609-7745) or any other Vedder Price attorney with whom you have worked.

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

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NLRB INVALIDATES ANOTHER EMPLOYEE INVOLVEMENT GROUP

Employer attempts to encourage employee participation in committees dealing with issues such as employee benefits and working conditions have been stymied in the past several years since the National Labor Relations Board (NLRB) has concluded that such groups constitute employer-dominated labor organizations, prohibited under the NLRA. Another such decision with the same result was recently issued.

Polaroid Corporation established an Employee-Owners' Influence Council (EOIC) and distributed applications to its approximately 8,000 employees at 8 locations. Polaroid interviewed 150 applicants and selected 30 employees to serve in staggered 3, 4, or 5-year terms. The Company provided the facilities for the EOIC and paid all its expenses.

The EOIC met regularly 62 times between mid-1993 and the end of 1994. The meetings were videotaped and dealt primarily with four issues: medical insurance benefits; the disposition of millions of dollars from an ESOP; employment termination policies; and time off from work for family and medical reasons.

The EOIC process typically involved Polaroid's organizational specialist making a presentation on a Company-selected topic, EOIC members "throwing out" ideas on the subject, a discussion by EOIC members and the Polaroid management presenter, a poll being taken among the EOIC members, and ultimately, the Polaroid representative reporting back to the EOIC on Polaroid's decision regarding the particular topic. As part of this process, Polaroid encouraged EOIC members to communicate with other employees about issues under consideration and to report back to the EOIC on employee sentiment. The Company also encouraged the EOIC to narrow its position to a limited number of alternatives.

Under Section 8(a)(2) of the NLRA, an employer cannot dominate or financially contribute to a labor organization. Employer domination is found where the employer selects the members, or determines the agenda of a labor organization or financially contributes to it. Employer domination is the norm in cases such as this one regarding employee involvement groups. The crucial question, usually, is whether or not the group constitutes a "labor organization" under Section 2(5) of the Act. A committee constitutes a labor organization if:

- employees participate;
- the organization or committee exists, at least in part, to deal with the employer(s); and
- these dealings concern grievances, labor disputes, wages, hours, or working conditions.

Here, Polaroid essentially conceded that 2 of these 3 prongs were met, *i.e.*, employees participated and the Committee concerned itself with benefits, hours, and working conditions (as opposed solely to operational issues such as quality, production problems, and efficiency). The crucial issue here was whether or not the EOIC "dealt with" Polaroid on these issues.

Polaroid claimed that the EOIC simply was a unilateral mechanism for brainstorming, information sharing, and the communication of individualized employee viewpoints. Thus, Polaroid maintained that the EOIC was a lawful vehicle akin to suggestion boxes, employee surveys, and general employee polls.

The Board rejected Polaroid's position, 3-to-1. The Board majority stressed the following facts:

1. The EOIC functioned as a bilateral mechanism to represent employees and present group proposals, inasmuch as EOIC members were encouraged to ascertain the views of other employees, group consensus of the EOIC was sought through polling in the meetings, and the EOIC was encouraged to narrow alternatives;
2. Polaroid responded to the EOIC; and
3. The EOIC represented an ongoing "pattern or

practice" of Polaroid, rather than an *ad hoc* occurrence.

The lone dissenter, Member Hurtgen, concluded that the EOIC did not "deal with" Polaroid, because management, not the employees, initiated the topics to be considered and because there was no evidence that Polaroid established the EOIC in order to avoid unionization.

The Polaroid decision once again demonstrates how difficult it is for an employer to lawfully establish and operate a committee of employees to focus on anything but the most clear-cut production/operational issues such as quality and efficiency. If you have any questions on this subject, please contact Larry Casazza (312/609-7770) or any other Vedder Price attorney with whom you have worked.

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EMPLOYEE BENEFITS UPDATE

Articles addressing the following topics appeared in the September issue of Vedder Price's *Employee Benefits Bulletin*. The *Bulletin*, with the full text of each article, is available on our website at www.vedderprice.com.

Section 415(e) Combined Plan Limits Repeal

The Internal Revenue Service ("IRS") recently issued guidance on the repeal of Internal Revenue Code Section 415(e). That section limits contributions and benefits of employees who participate in both a defined benefit plan and a defined contribution plan maintained by the same employer. IRS Notice 99-44 highlights the need for employers who maintain both defined benefit and defined contribution plans to examine the need for possible plan amendments before the end of the current limitation year. The potential impact of Section 415(e)'s repeal on nonqualified excess benefit plans also requires attention.

Group Life Insurance Uniform Premium Rate Changes

The IRS issued new regulations earlier this year governing

group term life insurance. The changes include a new uniform premium table (a) adding an age bracket for employees under age 25, and (b) reducing the imputed cost of group term life insurance for each age bracket. The new regulations require immediate attention by all employers providing more than $50,000 in group term life insurance coverage; they also require employers offering employee-pays-all life insurance policy arrangements to reexamine the payroll tax treatment of those arrangements.

401(k) Testing Procedures

Due to legislative changes, nondiscrimination testing for 401(k) plans can be performed by using either the old "current year method" or the new "prior year method." Under the prior year method, contributions made on behalf of highly compensated employees for the current (or tested) plan year are measured against those made on behalf of nonhighly compensated employees for the prior plan year. Prior-year testing provides more certainty for employers, and should lessen the need for year-end returns of excess contributions to highly compensated employers because the highly compensated employee contribution limit can be calculated at the beginning of the plan year. However, employers whose plans are experiencing a trend of increasing contributions by nonhighly compensated employees may prefer current year testing, because highly compensated employees would be able to utilize the corresponding increase to their contribution limits during the current year, rather than having to wait until the next year to benefit from the upward trend.

New COBRA Election Procedures

Under current law, employers who provide health coverage to employees must offer separate COBRA continuation coverage elections for different types of health benefits, such as medical, dental and vision. However, beginning next year, employers can offer an *all or nothing* election, so that a person electing COBRA coverage cannot pick and choose between separate benefits. To take advantage of this new election procedure, and thereby minimize the adverse claims experience created by COBRA, an employer must offer the health benefits under a single governing plan document. This can be accomplished even if benefits are provided through different insurers or third party administrators by utilizing a "wrap-around" welfare plan document.

Correcting Operational Errors in Qualified Plan Administration

Earlier this year, the IRS updated and expanded its qualified plans correction system known as the Employee Plans Compliance Resolution System. This article explores common operational errors and resolutions that are acceptable under the revised IRS guidance.

Monitoring the ESOP Nonallocation Rule

An employee stock ownership plan ("ESOP") often acquires shares of company stock in a tax-deferred sale under Section 1042 of the Internal Revenue Code. However, shares acquired by an ESOP in the transaction may not be allocated to the individual ESOP accounts of the selling shareholder, his family members or 25% owners. Compliance with the nonallocation rule requires careful planning, particularly with ESOPs sponsored by closely held corporations.

Marketability Discounts and ESOP Valuations

A federal district court recently issued one of the first published decisions explicitly accepting a low marketability discount in an ESOP valuation. A marketability discount is often applied when an appraiser determines the fair market value of nonpublicly traded stock to reflect the fact that the stock cannot be readily sold to a third party. Application of marketability discounts in ESOP valuations has been controversial, making the *Reich v. Hall* decision significant.

If you have any questions about these or other employee benefits topics, please call Tom Hancuch (312/609-7824) or any other Vedder Price attorney with whom you have worked.

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ODDs & Ends

Is He One of the Three Tenors?

The Second Circuit Court of Appeals recently ruled that the Metropolitan Opera didn't have to go before a jury to defend against a female employee's complaint that suggestive, naked male pictures on an office bulletin board caused a sexually hostile work environment. The pictures may have been offensive and inappropriate, said the court, but were not legally sufficient to get the plaintiff to a jury. A dissenting judge, who would have let the case go to trial, pointed out that the pictures had been displayed for over two years despite complaints by female employees.

Employer Caught Short on Height Requirement

Kohler Corp. has agreed to pay $886,500 and hire 111 rejected female job applicants to settle an OFCCP complaint against the company's "informal" policy of not hiring women under 5'4" for various factory jobs. As many as 2,000 short women who unsuccessfully sought jobs with Kohler may share in the monetary settlement.

How Does One Say "Golden Goose" in French?

After mandating a reduction in employees' workweeks from 39 to 35 hours, France announced in September that it will increase taxes on corporate profits in the year 2000. Presumably, the next step will be an increased tax on corporate bankruptcies in the year 2001.

I Love My Job, but Can I Go Home Now?

There are many NLRB cases dealing with lock-outs, but this is the first one we recall seeing about a lock-*in*. Junkyard Construction Co. had a dispute with a laborer's local union in New York City about the applicability of a multi-employer bargaining contract. In July, the NLRB found that the company unlawfully locked its employees inside a demolition job site to prevent them from talking with union representatives outside the site.

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