VEDDER PRICE

# Labor Law

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

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## EEOC FURTHER RESTRICTS AGE DISCRIMINATION WAIVERS

How would you feel if you negotiated the settlement of an age discrimination claim, paid the money to the claimant, had a signed agreement in hand waiving all age discrimination claims, and the claimant subsequently asserted the same or another claim in breach of the agreement? To deter claimants from doing just that, many employers include provisions in settlement agreements requiring that the claimant return all or part of the settlement money and/or pay the employer's attorney's fees if he asserts a claim in violation of the agreement. Beginning January 10, 2001, those "tender back" provisions are unenforceable and may invalidate the entire release of ADEA claims, according to the EEOC.

On December 11, 2000, the Equal Employment Opportunity Commission issued a final regulation placing further restrictions on the release of age discrimination claims under the Age Discrimination in Employment Act (ADEA). The regulation, which became effective January 10, 2001, applies to all agreements containing waivers of ADEA claims, including individual separation agreements, agreements in connection with a reduction in force (voluntary or involuntary) and litigation settlements. The regulation invalidates any provision (and possibly the entire age discrimination release) requiring a claimant to return the money received in settlement of an ADEA claim and/or pay the employer's attorney's fees if the claimant brings an ADEA claim after signing the settlement agreement.

The EEOC's ostensible purpose in issuing the regulations was to clarify issues addressed in the U.S. Supreme Court's decision in *Oubre v. Entergy Operations, Inc.*, 522

> A survey by *The American Lawyer* recently ranked Vedder Price among the top five most prestigious management-side labor practices in the country. The survey was conducted of legal recruiters who were asked to identify those firms having the most prestigious practice areas in labor and other areas.

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S.Ct. 422 (1998). In *Oubre*, the Supreme Court held that claimants may sue an employer under the ADEA even if they sign a release, accept the settlement money and refuse to return it. However, the Court left open the possibility that the parties to a settlement can agree to require return of the consideration if the claimant brings a claim in violation of the release.

The regulations close that door. It is unenforceable under the EEOC's view to obligate a claimant in a settlement agreement to return the monetary consideration or pay the employer's attorney's fees for challenging the enforceability of an ADEA waiver. The EEOC believes that such provisions may chill the right of an individual to contest an ADEA waiver under the Older Workers Benefit Protection Act. Put differently, the EEOC regulations enable an employee to keep the consideration provided by the employer as part of a separation or settlement agreement and, at the same time, sue the employer and claim that the ADEA waiver is invalid.

## In a Nutshell, the Regulations Provide:

- An individual cannot be required under a separation or settlement agreement to return severance pay or other consideration paid to support an ADEA waiver if he challenges that waiver and brings an ADEA claim.

- An individual cannot be required under a settlement or separation agreement to pay damages or the employer's attorney's fees for asserting an ADEA claim in violation of an ADEA waiver.

- The EEOC will argue that an agreement containing these types of provisions is unenforceable with respect to the entire ADEA waiver, not just with respect to the tender-back, attorney's fees or other offensive provision.

- The EEOC considers agreements containing a promise or "covenant not to sue" as problematic because they may suggest to a claimant that he is prohibited from challenging the enforceability of an ADEA waiver.

- If a claimant sues after signing a release, proves the release is unenforceable and ultimately prevails in an age-discrimination lawsuit, the most an employer can get is a setoff against the ultimate damages in an amount no more than the consideration paid for the release. For example, suppose an employer pays an employee $50,000 for a release, the employee sues anyway, and a jury awards the employee $25,000. The employer could get, at most, a $25,000 setoff. The employer could recoup neither the remaining $25,000 it paid for the release, nor any of its defense costs incurred in defending the litigation. If the employer won the suit, it could not recover anything paid to the employee for the unenforceable release.

- An employer may not abrogate its obligations under a separation or settlement agreement if the claimant sues in violation of the ADEA waiver. Thus, the employer would be required to continue to make payments or keep any other promises to which it agreed under the separation or settlement agreement.

## Conclusion

The regulations exceed the holding in *Oubre,* since nothing in *Oubre* prohibits an employer from seeking its defense costs or the return of severance money if an employee sues in breach of the release. Indeed, *Oubre* recognized that "in further proceedings . . . courts may need to inquire whether the employer has [such claims]." Thus, it is possible that some courts will refuse to follow the regulations. However, employers will face real difficulty if courts uphold the regulations and consider them to have retroactive effect, thereby

compromising the validity of existing agreements.

You should have counsel review the language you use in separation and settlement agreements. Release language you may have used for many years may need to be revised to reduce the risk that you pay for a waiver that is unenforceable.

If you have any questions, you may call Bruce Alper (312/609-7890), Kathie Contois (312/609-7591), or any other Vedder Price attorney with whom you have worked.

## NLRB FINDS THAT TEMPORARY CONTRACT EMPLOYEES MAY BE SUBJECT TO UNION ORGANIZING

As reported in Vedder Price's September 2000 *Labor & Employment Bulletin*, the NLRB has recently reversed many years of precedent by holding that an employer's "contract" employees may be included with its regular employees in a unit appropriate for collective bargaining. *M.B. Sturgis*, 331 NLRB No. 173 (2000). The decision involves two related cases. In one, the employer (*Sturgis*) sought to include 10 to 15 contract employees supplied by a temporary employment agency in a petitioned-for unit of its 34 to 35 regular full-time employees. In the other, the employer (*Jeffboat Division, American Commercial Marine Service Co.*) opposed a union petition to accrete 30 contract employees to an existing unit of about 600 regular employees. Essential to the Board's decision in both cases, the employer and the agency supplying the contract employees were found to be joint employers; they shared or codetermined matters governing essential terms and conditions of employment, such as hiring, supervision, direction, discipline and firing.

Previously, the Board's position was that when a union seeks to represent an employer's regular employees and jointly employed contract employees in a single unit, the unit is multiemployer in nature. Under established principles of multiemployer bargaining, such a unit cannot be found appropriate without the consent of the "user" employer and the "supplier" employer. *Lee Hospital*, 300 NLRB 947 (1990). However, the Board now finds that *Lee Hospital* was incorrectly decided. In the Board's view, the user and supplier employers are not equivalent to the completely independent employers typically found in multiemployer bargaining units. Consequently, employer consent is not required.

Henceforth, to determine whether such a unit is appropriate for collective bargaining purposes, the Board will apply its traditional community-of-interest test. Under this test, a group of employees working side by side at the same facility, under the same supervision, and under common working conditions, is deemed likely to share a sufficient community of interest to constitute an appropriate unit.

Consequently, employers who augment their work forces with contract labor from a temporary employment agency should be wary. The risk of having to bargain with a union over the employment terms and conditions of contract workers can be avoided if there is no joint-employer relationship with the supplying agency, or if no community of interest exists between regular full-time employees and the supplied contract workers.

Joint-employer and community-of-interest issues are complex and fact-driven. For assistance in assessing these issues, or if you have any questions about this update, please call Jim Petrie (312/609-7660), Larry Summers (312/609-7750) or any other Vedder Price attorney with whom you have worked.

## FINAL OFCCP RULES TO REQUIRE BIANNUAL REPORTING OF DETAILED PERSONNEL ACTIVITY AND COMPENSATION DATA, DESPITE FEDERAL CONTRACTOR OBJECTIONS

While streamlining the complicated process of drafting affirmative action programs, the final rules

issued on November 13, 2000 by the Office of Federal Contract Compliance Programs ("OFCCP") retain the controversial requirement that federal contractors submit detailed compensation and personnel activity data on their employees every two years. This decision came despite strenuous objections from employers and their representatives during the notice and comment period that this reporting requirement was excessively burdensome and too remote from OFCCP's objectives. In response to employer comments, however, OFCCP did amend several other provisions of the final rules.

As background, OFCCP is the federal agency charged with implementing Executive Order 11246, as amended. Executive Order 11246 prohibits certain Government contractors and subcontractors from discriminating in employment, and it requires these contractors to take affirmative action to ensure that employees and applicants are treated without regard to race, color, religion, sex, or national origin. In that regard, the current regulations require nonconstruction contractors and subcontractors with 50 or more employees and a contract of $50,000 or more to prepare and implement an Affirmative Action Program ("AAP") for each of their establishments.

## May 4, 2000 Proposed Rules

On May 4, 2000, OFCCP published a notice of proposed rulemaking to amend the Executive Order 11246 regulations. Among other things, the rules proposed to require contractors to complete and submit every two years an "Equal Opportunity Survey" that would supplement the AAP and include detailed information on (1) 12-month personnel activity at the facility, showing by race, gender and ethnicity the total numbers of applicants, hires, promotions, terminations, and active employees; and (2) compensation data broken down by gender and minority status for each job category, including information on the highest and lowest paid in each category and average length of tenure. In fact, during the comment period, OFCCP actually distributed these surveys to 7,000 contractors (including many reading this) as part of a "pilot program."

Other changes included in the proposed rules were designed to streamline the AAP process. For instance, the current "workforce analysis" portion of the AAP — which typically runs about 23 pages — was proposed to be replaced with a simpler, one-page organizational profile that encourages contractors to use existing charts that more closely reflect the actual organization of the establishment. Additionally, the complicated "eight factor availability analysis" — in which contractors must assess for each job group the availability of minorities and women in the overall workforce surrounding the facility, the unemployed workforce surrounding the facility, the workforce surrounding the facility having specific skills, the workforce surrounding the facility that would be able to train for specific skills, and the workforce of current employees — was proposed to be replaced by only two factors: external availability and internal availability. Further, OFCCP proposed to allow small employers (50 to 150 employees) to use EEO-1 categories for their job groups rather than require them to create job categories tailored to their organizations.

## November 13, 2000 Final Rules

Employers generally approved of the proposed rules relating to the streamlining of the AAP process, and they were incorporated into the November 13, 2000 final rules without substantive revision. Employer response to the proposed rule relating to the Employment Opportunity Survey, however, was unanimously critical. One major criticism was OFCCP's estimation that the survey would take only 12 hours to complete. Employers further questioned the value the information, standing alone, would have to OFCCP or to the employer, particularly in relation to the burden of assembling it and the information's sensitive and confidential nature.

Nevertheless, OFCCP retained the survey in its November 13, 2000 final rules. However, it made several promises and acknowledgments to allay at least some of the employers' concerns. First, OFCCP acknowledged that the time for completion of the survey was better estimated to between 12 and 21 hours. Additionally, OFCCP promised to maintain the compensation data in confidence and make it immune from Freedom of Information Act requests. Further, OFCCP stated that contractors under certain circumstances would have the option of submitting survey information either by job group or by EEO-1 category.

As noted, OFCCP did revise other provisions of the final rules in response to employer concerns. Most significantly, OFCCP revised the final rules to allow contractors to develop AAPs according to the internal organization of their businesses and to prepare a single plan for each business function or line of business, rather than separate plans for each geographic location as required in the past and in the May 2000 proposal. The final rules also allow for maintenance of AAPs solely in electronic form (so long as there is employee access) and for filing AAPs electronically.

Finally, OFCCP considered but did not change in its final rules the definition of "applicant," which some employers had sought to limit to only those who met the minimal job qualifications. Employers complained that the number of unqualified applicants had risen dramatically with the increase in the use of online applications, whereby applicants can receive applications without disclosing their job qualifications in advance. Stating merely that it had used the same definition of "applicant" since 1979, OFCCP refused to change the definition.

For further information on the final OFCCP rules or on affirmative action requirements generally, please contact Tom Snyder (312/609-7778), Janet Hedrick (312/609-7742) or any other Vedder Price attorney with whom you have worked.

## OSHA ADOPTS FINAL ERGONOMICS STANDARD

On November 14, 2000, the Occupational Safety and Health Administration ("OSHA") finalized its Ergonomics Program Standard, 29 CFR §1910.900 ("Standard"). The Standard, with its explanatory Preamble, covers over 600 pages in the Federal Register and is, to say the least, controversial, complicated, confusing and costly. With a stated goal to reduce the number and severity of musculoskeletal disorders ("MSDs") caused by exposure to workplace ergonomic risk factors, many believe that the Standard is based on faulty scientific principles and does not adequately provide for the separation between work-related and nonwork-related disorders.

Despite its claims to be a user-friendly standard that will not require employers — particularly small businesses — to hire expensive consultants and engage in costly and time-consuming ergonomic hazards abatement programs, the Standard will, in fact, make it difficult for most employers who reach the very low threshold, "Action Trigger," to be assured of adequate compliance without professional assistance.

The Standard, whose effective date is January 16, 2001, covers all general industry employers, including the U.S. Postal Service, and excluding from coverage only construction, maritime, agricultural and railroad operations. Although it does make provision to "grandfather" certain existing ergonomics programs, the criteria for grandfather status are narrow and rigid, and it is likely that many voluntary ergonomics programs now in place will not be able to satisfy these requirements.

Prior to October 15, 2001, all employers covered by the Standard must provide certain basic information to employees about MSDs, including (1) their signs, symptoms and causes; (2) to whom to report them; and (3) a summary of the Standard's basic provisions. Employers that do not already have ergonomics programs in place that qualify for grandfather status must implement such programs after October 15, 2001, if there is an "MSD incident" that the employer determines meets the Standard's

"Action Trigger," as defined by the Standard. If there is an "Action Trigger," then the employer must either (1) develop a complete ergonomics program for that and similar jobs; or (2) implement a "Quick Fix," if applicable. The required elements of the ergonomics program are management leadership, employee participation, MSD management, hazard reduction and control measures, training and periodic program review.

Obviously, if it took OSHA over 600 pages of the Federal Register to cover the Standard and its explanation, it is impossible to summarize such a complicated Standard in this space. (Vedder Price has also issued a more detailed summary of the Standard in its December 2000 *OSHA Observer.*) At this time, there is significant uncertainty as to how an employer is to comply and how OSHA intends to proceed with enforcement. Compounding the lack of precision with which the Standard is drafted are the many pending lawsuits filed by interested parties as diverse as the U.S. Chamber of Commerce and the AFL-CIO seeking to modify the Standard or block its enforcement entirely. Consequently, employers need to review the Standard's requirements immediately and carefully, but should consult with experienced OSHA counsel before beginning a costly implementation effort to determine whether the courts decide to stay enforcement of the Standard while the legal challenges are pending.

If you have questions about the new Standard or any other OSHA matter, please call Nina G. Stillman (312/609-7560) or any other Vedder Price attorney with whom you have worked. If you would like a copy of the December 2000 *OSHA Observer*, please call Barbara Stawski at 312/609-7596.

## NLRB PROHIBITS ELECTION-DAY RAFFLES; EXPANDS ANALYSIS OF EMPLOYERS' SUBSTANTIAL COMPLIANCE WITH VOTER LIST REQUIREMENT

Two recent decisions by the National Labor Relations Board have significantly changed the ground rules long applicable in representation elections. The cases follow on the heels of two other recent pivotal Board decisions that drastically altered long-settled principles of traditional labor law, *M.B. Sturgis* and *Epilepsy Foundation of N.E. Ohio. Sturgis*, as reported elsewhere in this Newsletter, reversed many years of precedent in holding that an employer's "contract" employees may be included with its regular employees in a unit appropriate for collective bargaining. In *Epilepsy Foundation*, as reported in the Vedder Price *Labor Law Newsletter* (August 2000), the Board extended to nonunion employees what is known as the *Weingarten* right to have a coworker present during an investigatory interview that may lead to discipline.

### Election-Day Raffles Barred

Now, the Board has overruled its own 31-year-old precedent on election-day raffles, adopting a *per se* prohibition on them, in *Atlantic Limousine Inc.* In a 3-2 decision, the Board overruled *Sony Corp. of America*, which sets forth a multifactor analysis for determining whether the holding of a raffle in connection with an election destroys the "laboratory conditions" necessary for assuring employees full freedom of choice in selecting a bargaining representative. The Board concluded the multifactor approach, which the Board began using in 1969, has led to sometimes contradictory results and left management and labor without clear guidance as to what constitutes appropriate conduct.

The Board found that Atlantic Limousine engaged in objectionable conduct by holding a raffle for employees on the day of a representation election, with a $350 color television/videocassette recorder as the prize. Five days before the election, the employer distributed a flyer announcing the raffle, which stated that the prize was "approximately equal in value to what your union dues and initiation fees could be for the first year." It also stated that the sole purpose of the raffle was to encourage voting and that

participation in the raffle was voluntary. Nevertheless, the Board ordered a new election.

The now-abandoned *Sony* multifactor test examined:

- Whether the raffle was used to propagandize about union dues;
- Whether raffle tickets were distributed in conjunction with electioneering at or near the polls;
- Whether distribution of tickets or receipt of the prize was contingent on how the employee voted or the election results; and
- Whether the value of the prize was so substantial as to induce voting for the employer.

The new rule adopted in *Atlantic Limousine* prohibits both employers and unions from conducting raffles if (1) eligibility to participate or win prizes is in any way tied to voting in the election or being at the election site on election day, or (2) the raffle is conducted at any time during a period beginning 24 hours before the scheduled opening of the polls and ending with closing of the polls.

Dissenters from the decision predicted it will have an adverse impact on employers. It is typically they, not unions, that have used election raffles, which the dissent termed a legitimate campaign tactic used to increase voter turnout.

## Analysis of Compliance with "Excelsior List" Requirement Is Expanded

In another recent decision, this one unanimous, the Board expanded the factors to be considered in determining whether an employer has substantially complied with its obligation to provide the Board with a list of employees eligible to vote in a representation election, in *Woodman's Food Markets*. Under *Excelsior Underwear*, decided in 1966, an employer must file with the Board's regional director a list of the names and addresses of all eligible voters. That submission must be timely, accurate and complete, but the Board decides, under the circumstances of each case, whether the employer has "substantially complied" with the requirement. A finding that the employer acted in bad faith will preclude a finding that it was in substantial compliance. However, in the absence of a showing of bad faith, over time the analysis has typically involved simply calculating the number of omissions as a percentage of the total number of eligible voters. In examining whether the employer has substantially complied, the Board has in some cases declined to set aside an election on the grounds that the number of omissions constituted only a small percentage of eligible voters, even though it constituted a determinative number of voters.

Now, following the Board's decision in *Woodman's Food Markets*, in addition to the number of names omitted, the analysis must take into account whether the omissions had a "potential prejudicial effect" on the election as reflected by whether the number of omissions is determinative (whether it equals or exceeds the number of additional votes needed by the union to prevail), as well as the employer's reasons for omitting the names.

In expanding the factors to be considered, the Board in *Woodman's Food Markets* concluded that the former approach failed to further the purpose of the *Excelsior* rule, which it noted is to ensure that all employees are fully informed about the arguments concerning representation.

The employer in *Woodman's Food Markets* omitted the names of at least 12 eligible voters from its list. The union lost the election by a 49-36 vote, with seven challenged ballots. The Board found that the union may have suffered "substantial prejudice" by its inability to communicate with the omitted employees, because those individuals could have affected the election outcome. It also concluded that the employer failed to provide a legally sufficient justification for omitting the names and demonstrated a lack of diligence and due care in compiling the list. The Board remanded the case for a determination of the eligibility of two voters, which would in turn determine whether the

omissions could have affected the outcome of the election, thereby warranting a revote.

If you have any questions about these cases, please call Eileen Berner (312/609-7774), Janet Hedrick (312/609-7742) or any other Vedder Price attorney with whom you have worked.

## SEVENTH CIRCUIT FINDS WITHDRAWAL OF TEACHING SUPPLIES TO BE TANGIBLE EMPLOYMENT ACTION IN SEXUAL HARASSMENT CASE

The Seventh Circuit Court of Appeals recently gave a broad reading to what constitutes a "tangible employment action" sufficient to prevent an employer from asserting an affirmative defense to a sexual harassment claim. In *Molnar v. Booth*, the Seventh Circuit found that an intern art teacher experienced tangible employment actions when her school principal allegedly withdrew promised teaching supplies and gave her a negative performance evaluation. Consequently, the school was barred from asserting an affirmative defense based on its policy prohibiting sex discrimination.

### Molnar's Claim of Sexual Harassment

Plaintiff Lisetta Molnar had been hired by the East Chicago Community School Corporation ("East Chicago") as an intern to teach art classes at Westside Junior High School. Molnar claimed that Lloyd Booth, the principal of Westside, made sexual advances towards her, accompanied by suggestions that he could obtain "perks" for her, such as art supplies and a permanent art room. Molnar further claimed that when she rejected Booth's advances, he took back supplies he had given her, refused to help her secure her own art room and gave her a negative performance evaluation, which Molnar claimed would have prevented her from receiving her teaching license. After her union filed a grievance, the school board reversed the negative evaluation but neither investigated Molnar's charges of harassment nor took action against Booth.

Molnar sued East Chicago and Booth for sexual harassment under 42 U.S.C. § 1983, which provides a right to sue state employers and employees for civil rights violations, and also sued East Chicago under Title VII. A jury awarded her $500 in compensatory damages against Booth and East Chicago jointly, and $25,000 in punitive damages against Booth. The trial court then awarded her attorneys' fees of $65,760 against both Booth and East Chicago.

### Noneconomic Penalties Constituted "Tangible Employment Actions"

On appeal, the Seventh Circuit analyzed Molnar's claim to determine whether she showed harassment followed by a "tangible employment action." Under the Supreme Court's 1998 decisions in *Burlington Indus., Inc. v. Ellerth* and *Faragher v. City of Boca Raton*, an employer is vicariously liable under Title VII for harassment by an employee's supervisor. If the harassment culminates in a tangible employment action such as decrease in salary, termination, demotion, loss of benefits, or reassignment, the employer may not raise an affirmative defense to liability or damages. However, if the harassment does not lead to a tangible employment action, the employer may defend by showing that it took reasonable preventive and corrective measures against the harassment and that the plaintiff unreasonably failed to take advantage of the employer's procedures or otherwise avoid harm. The definition of "tangible" was left to the lower courts to interpret.

The Seventh Circuit held that Molnar's allegations presented a "close call" but did in fact show a tangible employment action. The Court found that Booth's alleged withdrawal of art supplies he had previously given Molnar was the "clearest tangible employment action shown." Although this action did not result in economic loss or diminution of status, the Court found that the jury could have believed that the supplies were necessary to perform Molnar's job.

This finding suggests that courts may be more willing than anticipated

to find tangible employment actions that are noneconomic in nature. Further support for this inference is seen in the Court's finding that, "at least as a temporary matter, the negative evaluation Booth gave Molnar was also a tangible employment action." Although the evaluation was overturned six months later and ultimately caused no harm to Molnar's career, the Court found that "the jury could have believed that it spelled the end of a career for an intern." The Court also stated that a ruling that the evaluation did *not* amount to a tangible employment action would allow supervisors to harass subordinates freely as long as they later reversed the actions. The Court further held that, even if Molnar had not shown a tangible employment action, East Chicago could not prove an affirmative defense based on its general discrimination policy and procedures because the policy neither defined harassment nor established reporting procedures, and because East Chicago never investigated Molnar's charges.

### School Corporation May Bear Cost of Attorneys' Fees for Principal's Actions

One interesting side note in the case was the Court's apportionment of attorneys' fees between the two defendants. The jury awarded Molnar actual damages of only $500, but awarded her punitive damages against Principal Booth under section 1983 in the amount of $25,000. The trial court then awarded Molnar attorneys' fees of $65,760 and held that Booth and East Chicago were jointly and severally liable for these fees. The practical effect of joint and several liability is that the plaintiff can recover the full amount from either defendant. That defendant may then sue the other to determine liability as between the two and recover the other defendant's contribution.

On appeal, East Chicago argued that liability for the attorneys' fees should be apportioned between East Chicago and Booth based on fault rather than being imposed jointly and severally. East Chicago argued that Molnar's actual damages were so small in comparison with the punitive damages assessed against Booth that East Chicago should be held responsible for a smaller portion of the fees expended to secure those awards.

The Seventh Circuit refused to overturn the District Court's ruling on joint and several liability because the issues were the same or similar for both defendants and because East Chicago's policies may have been influenced by Booth. Therefore, the fees could not be separated into those for charges against Booth and those for charges against East Chicago.

If you have any questions about this case or other sexual harassment law issues, please call Alison Maki (312/609-7720) Janet Hedrick (312/609-7742) or any other Vedder Price attorney with whom you have worked.

## MEDICAL RESTRICTIONS MAY TRIGGER THE "INTERACTIVE PROCESS" EVEN WITHOUT A REQUEST FOR ACCOMMODATION

While employers may generally understand that they are required to engage in an "interactive process" in order to address a disabled employee's need for reasonable accommodation, it is often unclear when that requirement is triggered under the Americans with Disabilities Act ("ADA") and which party is responsible for initiating the process. The start of the process may not be as obvious as the employee's requesting a conference to address possible accommodations.

The EEOC regulations under the ADA provide that "[t]o determine the appropriate reasonable accommodation it may be necessary for the [employer] to initiate an informal, interactive process with the [employee]." The regulations do not specify what actions trigger the process. However, the regulations state that "[t]he appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the employee with a disability." The courts often scrutinize the actions of both parties in assigning blame if the negotiations fail.

This scrutiny was illustrated recently when United States District Court for the Northern District of Illinois denied the employer's motion

for summary judgment on the ground that factual issues existed as to which party was responsible for obstructing the interactive process. The plaintiff alleged that Movado Group, Inc. (Movado) failed to provide her with a reasonable accommodation, in violation of the ADA. The plaintiff worked for Movado as a Vice President of Premium and Incentive Sales, which required her to oversee a national sales force and attend sales conventions throughout the country.

Approximately a year after she was hired, the plaintiff underwent two operations on her spinal column that left her "totally disabled." Several months after the procedures, however, her treating physician authorized her return to work with restrictions that prohibited her from lifting more than ten pounds, sitting or standing for more than 30 minutes at a time, stooping, bending, or climbing, and required her to wear a back brace. Based on these limitations, Movado's Human Resources Department determined that she was unable to work because her restrictions limited her ability to travel on an airplane.

The Vice President of Human Resources suggested that the plaintiff be examined by another doctor, but never followed up with her treating physician, discussed other possible work restrictions, or made further contact with her. A vocational rehabilitation expert later testified that various accommodations, if they had been considered, could have enabled her to return to work. Possible accommodations included (1) modifying the product line and her briefcase to make it lighter and easier to carry; (2) sending the product by mail so that she would not have to carry samples; (3) varying her work hours so that she could work in the evening and take periodic breaks; (4) decreasing her work schedule from full-time to part-time; and (5) allowing her to travel by train (with a sleeping car).

Each party blamed the other for impeding the interactive process. The plaintiff claimed that Movado should have contacted her treating physician, or another doctor, to discuss possible accommodations. Movado argued that she never actually requested a reasonable accommodation, so the interactive process was never formally initiated. The District Court held, however, that a reasonable jury could have found that she initiated the interactive process simply by presenting Human Resources with her return-to-work authorization.

The Court could identify no action on the part of Movado to encourage the exchange of ideas. Specifically, Human Resources never attempted to communicate with the plaintiff to discuss possible accommodations, never contacted her treating physician, and never sought her permission to obtain additional medical information. Consequently, the Court held that Movado failed to show that the plaintiff was accountable for thwarting the interactive process. While Movado was not required to shoulder the entire burden of motivating and effectuating the interactive process, it was unable to show that it either initiated communication or responded to her attempts at discussion.

If you have any questions about reasonable accommodations or any other ADA issue, please call Angela Pavlatos (312/609-7541), Janet Hedrick (312/609-7742) or any other Vedder Price attorney with whom you have worked.

## ODDs & Ends

### Turn the Other Cheek (and Call Your Attorney)

Earlier this year, the California Court of Appeals upheld an $870,000 jury verdict to a salesman who alleged that his company president grabbed, hit and shook him, dragged him out of an office and down a hall and swore at him. The appellate court expressly criticized the trial judge's comment that the salesman should simply have punched out the company president instead of suing him. There turned out to be 870,000 reasons why the trial judge was wrong.

### "Paper or Plastic, You @#!*?"

Plaintiff Karl Petzold worked as a grocery store "courtesy clerk"/ bagger with constant public contact. Due to his Tourette Syndrome, Petzold involuntarily, but on a daily basis, used racial slurs and obscenities in front of customers. When he was fired, he sued his employer in a Michigan court claiming disability discrimination under state law. Although the trial court ruled that the case should go to trial, the Michigan Court of Appeals disagreed, holding it would be "ridiculous to expect a business such as defendant [grocery store] to tolerate this kind of language in the presence of customers ..."

### Labor Board: "Harassment" Doesn't Include Pro-Union Conduct

A union was trying to organize a North Carolina company and employee supporters periodically distributed pro-union leaflets in the plant. On one occasion, several employees complained of "harassment" by two of the pro-union workers for bursting into their break areas and thrusting leaflets at them. A joint employee-management committee reviewed the complaints and took no action in either case.

The Labor Board majority found that although the Company's actions were consistent with its overall harassment policy, the Company should not have applied that policy to protected activities (distribution of union literature). Dissenting Board Member Hurtgen found no coercion or interference in the Company's actions, which were a "prudent and reasonable course" in investigating an employee complaint.

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