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Registration Open for LMV 2014 Employee Relations Summit

LMV is pleased to invite our friends and clients to our 2014 Employee Relations Summit on November 18, 2014, from 7:30 a.m. to 4:00 p.m. at Rosewood Hall in SoHo Square, Homewood, Alabama. During this full-day, complimentary seminar, we will assess the current labor and employment law landscape and share what we think are the emerging best practices for model employers. To register, please contact Marilyn Cagle at 205.323.9263, mcagle@lehrmiddlebrooks.com. Our agenda for the Summit:

7:30 - 8:15 a.m.
Registration, Continental Breakfast

8:15 - 8:30 a.m.
Welcome and Introduction
Richard Lehr

8:30 - 9:45 a.m.
Ten for '15: The 10 Hot Spots for 2015
Presenters:
Al Vreeland
Whitney Brown

9:45 - 10:15 a.m.
The Impact on Business of the National and State November 4, 2014 Election Results
Presenters:
George Clark, President,
Manufacture Alabama;
Hal Bloom, The Bloom Group, Inc.,
Lobbying and Governmental Relations Specialists

10:15 - 10:30 a.m.
Break

10:30 a.m. - 11:15 a.m.
Regulatory Agency Forecast: What to Expect from the EEOC, OSHA, Wage and Hour, and the NLRB
Presenters:
Lyndel Erwin
Jerome Rose
John Hall
Frank Rox

11:15 - 12:15 p.m.
We Are Here to Stay: UAW's Lead VW Organizer Discusses the Ongoing VW Campaign, the Union's "Southern Strategy" and Answers Your Questions
Presenters:
Mitchell Smith, United Auto Workers;
Jürgen Stumpf, Volkswagen

12:15 - 1:30 p.m.
Lunch (provided)
Economic, Business and Workforce Trends and Predictions
Presenter:
Richard Lehr

1:30 - 2:15 p.m.
Plaintiffs' Attorneys' Perspectives on Employment Litigation During 2015 and LMV Plans to Avoid/Defend These Lawsuits
Presenters:
Candice McGowan, of Wiggins Childs Pantazis Fisher & Goldfarb; and
David Middlebrooks

2:15 - 2:30 p.m.
Break

2:30 - 3:15 p.m.
Affordable Care Act, Wellness Programs, Medical Information Confidentiality: Employer Rights
Presenter:
Jamie Brabston

3:15 - 3:45 p.m.
Hiring Compliance
Presenters:
Mike Thompson
Mike Green

3:45 - 4:00 p.m.
"Open Mic" Questions and Discussion
Wrap-Up
Richard Lehr

4:00 p.m.
Adjourn

HRCI credit approval is pending.

Hotel accommodations are available at Aloft Birmingham – SoHo Square, 1903 29th Avenue South, Homewood, Alabama 35209. You may make reservations by calling 1.877.822.1111 and ask for the discounted "Lehr Middlebrooks Group" rate. Or you may book directly at https://www.starwoodmeeting.com/Book/lehrmiddlebrooksblock. Please note that reservation requests received after Monday, November 3, 2014, will be provided on a space available basis at prevailing rates.

We look forward to seeing you on November 18.

The Importance of Investigation Before—Rather than After—the Employment Decision

Have you ever been shopping and found something—a pair of jeans, a watch, a bottle of wine—that you just loved, and when you bring it to the register, you learn that it's 50% off? You were willing to pay full price based simply on preference, but you feel doubly-smart when you see the discounted price on the register screen.

We welcome these small confirmations that, yes, we made the right choice. But, they're just that: confirmations. They didn't actually influence our decision, they just made us feel better about it. In the case of *Kroll v. White Lake Ambulance Auth.* (6th Cir., August 19, 2014), a supervisor took action based on a couple of complaints and the supervisor's own beliefs about the employee's morality. As he learned throughout the course of the lawsuit, the supervisor made the right decision: the employee's personal problems had infected her job performance, and she was a danger to herself and others. However, because the supervisor hadn't discovered all that confirmation evidence until after he took the employment action, it couldn't be used to the employer's benefit.

Employee Kroll was an emergency medical technician whose job required her to provide care for patients when called out on an emergency basis. Kroll had a "tumultuous" affair with a co-worker (not a supervisor). After the affair, co-workers reported two significant work-related incidents involving Kroll to their supervisor. In one case, Kroll violated a company policy by talking on her cell phone while driving the ambulance. In the other, Kroll refused to respond when a co-worker asked Kroll to provide oxygen to a patient in the ambulance. Right before she ignored that co-worker, she and that co-worker had been involved in a heated argument because Kroll had accused the co-worker of sleeping with her paramour.

The employer did not terminate Kroll, but rather required that she receive psychological counseling. Now, an employer can require psychological counseling (a medical exam) of a current employee if it is job-related and consistent in business necessity. In this case, in our view, the employer clearly had job-related bases to demand that the employee participate in counseling. Talking on the cell phone while driving an ambulance is a safety risk to all involved and not responding to provide oxygen to a patient is an obvious safety risk to that patient. However, our motivations were not the supervisor's motivations, and the supervisor's motivations controlled the outcome in this case. The supervisor testified that he compelled Kroll to attend counseling because of his concerns about her *personal* and *sex* life (and not just the portion of it occurring with co-workers) and his belief she would benefit from counseling.

Given that the supervisor's motivations largely stemmed from Kroll's outside-of-work behavior, the employer faced—and lost—a tough battle to prove that the demand to seek psychological counseling was job-related.

Importantly, the Court strongly suggested that had the supervisor more thoroughly investigated Kroll's behavior, he could have located several other incidents where Kroll used her cell phone while driving the ambulance, which could have led him to conclude that Kroll's emotional problems were leading her to operate the ambulance (an essential job function) improperly, thus possibly making the demand that the employee seek counseling job-related.

Also, we note that Kroll's supervisor could have disciplined her for the behavior as reported to him, without turning the meeting into a Dr. Phil moment. Had he investigated prior to issuing discipline (and thus discovered the several incidents of cell phone use while driving), he likely would have been justified in immediately terminating her. Indeed, the Justices roundly condemned the supervisor's moralistic tone, including the allegation that he told Kroll that she would end up getting raped if she kept picking up random men at the bar. Again, it was the supervisor's focus on Kroll's out of work behavior that prevented the employer from showing that counseling was job-related.

The employer had one last hope: the direct threat defense, which puts a high burden on employers to prove that the employee poses a direct threat to themselves or others. Among other things, a direct threat must be more probable than possible and must pose a risk of significant harm. Employers who work in the public safety field normally get a presumption that the potential for harm is significant. Even with this presumption, the Court held that the supervisor did not have enough facts to conclude that a pattern of dangerous behavior existed to make the threat to the public probable. Again, the Court left open the possibility that had he investigated, the supervisor could have located sufficient evidence to conclude Kroll did pose a direct threat. The employer just simply wasn't permitted to use all the evidence confirming that it had made the right decision because the supervisor had not been aware of the evidence when he made his decision.

Retaliation and Timing: How Long Does the Connection Remain?

The key "first impression" in any retaliation claim is the timing of the adverse action in relation to when the employee engaged in the protected activity. The ideal situation for an employer is when the adverse action is a continuation of progressive discipline which began prior to the protected activity. Thus, in September, the employee is suspended for unsatisfactory performance, the employee misses the month of October due to FMLA and, when the employee returns in November, the unsatisfactory performance continues and the employee is terminated, resulting in a retaliation claim. The employer is in a strong position, because of the connection between the pre- and post-protected activity actions.

Three recent cases explored the issue of timing in retaliation claims. In the case of *Malin v. Hospira, Inc.* (7th Cir., August 7, 2014), the appellate court upheld a retaliation claim which arose three years after the employee's alleged protected activity. The employee alleged that she was sexually harassed by her indirect supervisor. Her direct supervisor discouraged her from bringing the harassment claim. Three years later, she was demoted during a company reorganization. The lower court had granted summary judgment for the employer based upon the remoteness of the protected activity compared to the adverse action. In reversing the lower court, the Seventh Circuit stated that, "a long time interval between protected activity and adverse employment action may weaken but does not conclusively bar an inference of retaliation." The Court also noted that the plaintiff was denied promotions during that same three-year period, when the decision-maker about promotions was the same supervisor who discouraged her from bringing a sexual harassment claim.

In the case of *Langenbach v. Wal-Mart Stores, Inc.* (7th Cir., August 4, 2014), the Court ruled that the five months timing between the employee's FMLA absence and termination was not connected, because the employee had been on a performance improvement plan (PIP) prior to the leave and failed to improve after the leave.

In *Munoz v. Nutrisystem, Inc.* (E.D. Pa., July 30, 2014), an individual brought an ADA claim after she was terminated for excessive absenteeism. Although the Court ruled that the employer failed to engage in a reasonable accommodation discussion with the employee, "there is no suggestion that the company treated Munoz differently than other employees or counted her disability-related absences more heavily." Further, Munoz claimed retaliation because she was terminated two months after she requested a reasonable accommodation for her absences. The Court stated that the two-month gap was not close enough to her protected action to "suggest retaliation." Furthermore, the Court stated that the employer was not hostile in response to her request for accommodation.

Retaliation is the fastest growing employment claim in the country, appearing in approximately 40% of all discrimination charges. OSHA is responsible for enforcing retaliation claims covering 22 different federal statutes. There are multiple state and local laws which prohibit retaliation. The following are some principles for employers to consider when evaluating a decision in conjunction with a potential for a retaliation claim:

1. What was the timing of the decision in relation to the protected activity? The closer in time (such as a few months) to the protected activity, the greater the clarity the employer must show that the decision would have been made regardless of the protected activity.

2. Is there a possibility of connecting the reason for the adverse action to counseling or discipline which occurred prior to the protected activity? The "before and after" approach is one of the strongest an employer can raise to avoid or defend retaliation claims.

3. Was the protected activity (typically a complaint that some law or standard was violated) handled professionally? Did the employee receive assurances that the complaint would be taken seriously and that there would be no retaliation? Did the employer take precautions to shield the employee from retaliation?

4. Were there positive employment actions which occurred subsequent to the protected activity? For example, if an employee received a raise two months after returning from leave and is terminated two months thereafter, the argument is why would an employer retaliate when the employer gave the employee a raise?

5. Was the employer's actions toward the employee consistent with how the employer handled analogous situations?

NLRB: Sexual Harassment Complaints Protected Under National Labor Relations Act

We have provided monthly updates of the National Labor Relations Board's expansion of the scope of Section 7 rights in the private sector workplace. The case of *Fresh & Easy Neighborhood Mkt., Inc.* (August 11, 2014) is a case where the NLRB extended protection to an employee speaking to other employees about documenting a sexual harassment issue.

An employee asked a supervisor if she could participate in a company training program known as "TIPS." The employee was asked to write a note to the supervisor on the whiteboard in the training room, which she did – "TIPS training." A few days later, the employee noticed that the "TIPS" was replaced with "TITS" with the name of the employee (Elias) and a cartoon of someone urinating on her name. She reported this to her supervisor, who discouraged her from bringing a harassment complaint. She then copied what was on the board, showed it to other employees, and asked other employees to sign the document (several did). The company took a picture of what was on the board and erased it. The company told Elias that she could talk to other employees about this incident and ask them to become witnesses, but she should not try to obtain any statements from employees while the company conducted its own investigation. Ultimately, the company found out who did it, disciplined him, and notified Elias of the action and protection against retaliation.

Elias filed an unfair labor practice charge, alleging that the employer's request that she not obtain further witness statements violated her Section 7 rights. The Administrative Law Judge dismissed her complaint, stating that her request to get statements from others was purely personal and did not involve concerted, protected activity. In overturning the ALJ's decision, the NLRB in a 2-1 vote, stated that the employee's request for support from others was for "mutual aid or protection" and, therefore, protected Section 7 activity. In disagreeing with the Board's decision, Member Miscimarra said that the employee's request was simply for other employees to witness what was on the paper, not to provide a statement. The impact of this decision is that potentially every employee request of any other employee for assistance in dealing with workplace harassment can arguably be considered for "mutual aid or protection" and, therefore, protected under Section 7 of the National Labor Relations Act.

NLRB Tips: Avalanche of Pro-Union Decisions Continues Unabated at the NLRB

This article was prepared by Frank F. Rox, Jr., NLRB Consultant for the law firm of Lehr Middlebrooks & Vreeland, P.C. Prior to working with Lehr Middlebrooks & Vreeland, P.C., Mr. Rox served as a Senior Trial Attorney for the National Labor Relations Board for more than 30 years. Mr. Rox can be reached at 205.323.8217.

As has been predicted, the current Board continues to push its pro-labor agenda, seeking to accomplish through litigation and rulemaking what the Obama administration could not accomplish in Congress. Below are summaries of several decisions emanating from the NLRB that demonstrate the Board's unwillingness to respect case precedent that has existed for decades.

NLRB Presses Ahead with Lowering the Bar for Finding a Joint Employer Relationship

On July 29, 2014, the McDonald's Corp. announced that it had been notified by the NLRB that it faces unfair labor practice allegations as the "joint employer" of workers at its franchised stores. This decision was not wholly unexpected, as the Board in Washington, D.C. had been reviewing the test for determining joint employer status in a pending, unrelated case involving employees of a staffing agency. The staffing agency, doing business as Leadpoint Business Services, provided recycling service workers to Browning-Ferris Industries' subsidiary, BFI.

In *BFI*, the Board signaled that it was dissatisfied with the state of the current law used to determine joint employer status, and solicited briefs as to whether the NLRB should change its standards for the finding of joint employer status. It is likely that the Agency, through its adjudication process, intends to loosen the standards for finding a joint employer relationship.

The result of lowering the bar to find a joint employer relationship will potentially be a significant development. For example, contracting employers who use workers from a staffing agency can be held liable for the unfair labor practices of the staffing agency (the co-employer). In addition, the contracting employer/client could be compelled to play a part in the bargaining process should a union gain certification, thereby opening it up to unreasonable and intrusive information requests by a union.

Despite having pending litigation before the NLRB in the BFI case, the General Counsel (GC) did not wait on the Board to render its decision. Instead, the GC pressed ahead in the process of changing the joint employer criteria by taking on the franchisor/franchisee business model as it has existed for many, many years.

If the General Counsel's approach to joint employer status gains acceptance by the federal courts, it would be a major blow to industries that employ the use of staffing agencies, as well as franchise business models.

The Charges Against McDonald's and the Attack on Franchising

Out of approximately 181 ULP charges filed against McDonald's Corporation and its franchisees, the General Counsel has found merit to 43 cases, with 64 remaining cases currently pending completion of the investigation. In the 43 cases determined to have merit so far, the Regions will issue complaints naming McDonald's USA, LLC and its franchisees as joint employers and co-respondents.

The ULP charges stem from the ongoing campaign by the SEIU to establish a $15 per hour wage floor for fast food workers, and the topic has been in the press over the past several months. During this time, the SEIU argued that McDonald's USA is a joint employer with its franchisees because the corporate entity exercises "substantial control" over its franchises. SEIU notes that McDonald's frequently owns and leases the store buildings to franchisees, and also requires franchisees to follow strict corporate rules on food, cleanliness and hiring.

McDonald's USA has announced that it intends to contest the NLRB decision, and that the facts in the charges do not establish "a joint employer relationship under the law." The NLRB Advice opinion has not yet been released to the public. Until some of these charges are litigated and/or settled, the details of the Board's rationale for finding corporate McDonald's a joint employer with its franchisees will remain unknown.

Reaction by the Fast Food/Franchise Industry

Universal condemnation by franchise industry groups, restaurant associations, and the Chamber of Commerce was quick. Various management-side representatives criticized the NLRB decision and cited the Board's pronouncement as evidence of the Agency's pro-union agenda. McDonald's, in its press release, stated that:

> McDonald's . . . believes that this decision changes the rules for thousands of small businesses, and goes against decades of established law regarding the franchise model in the United States.

The International Franchise Association stated:

> The NLRB [general] counsel's decision could have ripple effects that would harm all kinds of businesses that run on a franchise model.
>
> Ruling that franchises are joint employers will be devastating blow to franchise businesses and the franchise model.

Finally, the U.S. Chamber of Commerce commented that:

> Unions . . . see undermining franchise relationships as key to organizing fast-food employees.

The Chamber of Commerce's concern is legitimate. If the Board's approach to the joint employer issue gains traction in the Courts, franchisors could potentially be exposed to an avalanche of organizing activities involving their franchise operations. While the *Leadpoint/BFI* case that is under review is an representation case, it nevertheless involves the issue of who really controls the employees supplied by Leadpoint – the staffing agency or BFI. On a positive note, and contrary to BFI's situation, the McDonald's corporate entity does not actually hire the store employees or get its employees from the franchisees.

Avoiding a Joint Employer Finding by the Board – Where the Agency Goes Next

The cases pending before the NLRB are in their nascent stage of prosecution by the Agency, and involve business operations in the waste disposal and fast food industries (typically a franchise business model). However, the parameters proposed by the General Counsel will likely be eventually applied to all private sector employers involved in unfair labor practice charges where the facts do not lend themselves to the joint employer analysis proposed by the General Counsel.

If the Board changes the standards for finding joint employer status, and articulates a plausible and legally defensible explanation for such a change, it is likely that a Court of Appeals will approve that change. Unfortunately, the measure of review of regulatory agency action (such as the NLRB) is limited to an "abuse of discretion" standard. In other words, the Circuit Court would have to find that the Board "abused its discretion" in changing the standards for finding a joint employer. This is, quite frankly, a very low bar for the Agency to clear, and it appears unlikely that there would be any meaningful relief from the Courts from a NLRB administrative change in the joint employer standards.

In addition, the Obama Board seems intent on pursuing its pro-labor agenda, and Congress appears powerless to stop the Agency from aggressively following its plan.

Thus, it seems inevitable that the Board will pursue its joint employer initiative as far as the Courts and Congress will allow.

Practical Tips for Employers to Follow Now

The following suggestions are aimed at avoiding an adverse finding of joint employer status by the NLRB during an unfair labor practice investigation in a franchisor/franchisee relationship.

- Consider amending the franchise agreement to grant franchisees more autonomy to run it day-to-day operations. Employers should take steps to reinforce the parts of their business that already run autonomously. In other words, MORE autonomy, not LESS, is better from a factual standpoint should the NLRB become involved in an ULP investigation.

- In its training documents and franchise agreements, franchisors should offer "best practice" suggestions and examples of how the ideal franchise business should operate. However, it should be made clear, in explicit language, that hiring/discipline/leave and other implemented personnel policies (in other words, the day-to-day operational decisions) belong solely to the franchisees.

Conclusion

This is the opening salvo of the NLRB in expanding labor's entrée into corporate America via a "joint employer" analysis. Employers should not over-react and make wholesale changes at present, but should carefully watch developments as they unfold.

It remains an outside possibility that the Board will not follow the General Counsel's lead in changing the joint employer standards. I am not optimistic that this will happen, as the General Counsel and members of the Board operate in virtual lockstep when changing long-standing case law precedent. To be blunt, there is little doubt that the "fix" is in under the Obama administration.

The good news is that the ultimate outcome of the proposed changes is quite a bit down the road - years in all likelihood. In the meantime, if there is any organizing or protected concerted activity at a facility that could generate unfair labor practice charges, it is recommended that employers immediately contact counsel to get ahead of any potential problems associated with the Agency's position on joint employers.

The *Macy's* and *Neiman Marcus* Decisions – The Board's Application of *Specialty Healthcare*

The prediction of increased organizing among small, readily identifiable groups of workers by unions wishing to get a "foot in the door" has begun in earnest.

Two recent decisions by the Board considered micro bargaining units in the retail store industry. In one decision (*Macy's*), the Board approved a bargaining unit among the store's cosmetic and fragrance employees. In *Neiman Marcus,* the Agency rejected a bargaining unit consisting of women's shoes sales workers on two separate floors, working under different administrative departments. The decisions are discussed below.

Macy's Inc., 364 NLRB No. 4 (2014)

In *Macy's, Inc.*, issued on July 23, 2014, the Board upheld a Director's decision and direction of election, finding that a 41 person unit of cosmetic and fragrance employees was an appropriate bargaining unit.

The majority found that that "the employees in the petitioned-for unit are a readily identifiable group who share a community of interest, and that the employer has not met its burden of demonstrating that the other selling and non-selling employees it seeks to include share an overwhelming community of interest with the petitioned-for employees so as to require their inclusion in the unit."

The Board rejected the employer's argument that the only appropriate unit would either be a wall-to-wall unit of all workers, or alternatively, one that comprised the entire store's selling employees.

In dissent, member Miscimarra stated that he would not apply the ruling in *Specialty Healthcare* in any case before the Agency.

> [this case] illustrates the frailties associated with the Specialty *Healthcare* standard . . . [and the application of that standard] constitutes an unwarranted departure from standards developed over the course of decades that have long governed the Board's bargaining unit determinations.

Though no formal announcement has yet been made, expect an appeal of this decision by the NLRB.

<u>*Neiman Marcus Group, Inc. d/b/a Bergdorf Goodman,* 361 NLRB No. 11 (2014)</u>

In *Neiman Marcus,* in a decision that has apparently set some limits on union attempts to organize micro-units, the Board remanded the matter back to the Regional Director after it rejected a determination that "salon" and "contemporary" woman sales associates shared a substantial community of interest warranting a small bargaining unit.

In rejecting the petitioned-for unit, the Board emphasized that unlike the facts contained in the *Macy's* decision (where the petitioned-for employees conformed along departmental lines and comprised <u>all</u> fragrance and cosmetic sales persons), "salon" shoe sales workers comprised the whole of their department, while the "contemporary" shoe sales associates were only a <u>part</u> of their overall sportswear department.

In addition, the Board noted that in *Neiman* there was a marked lack of daily contact between the sales persons, and little to no interchange between the two departments, either on a temporary or permanent basis.

> In conclusion, [the rejection of the petitioned-for unit is dictated], by the lack of any relationship between the contours of the proposed unit and any of the administrative or operational lines drawn by the Employer (such as departments, job classifications, or supervision), combined with the complete absence of any related factors that could have mitigated or offset that deficit. (this is a reference to interchange and contact between the sales persons).

<u>The Good News – What May be Gleaned From the *Neiman Marcus* Decision</u>

While questions still linger, this decision provides some insight into the limits of what the Board will allow and not allow when organizing micro-units.

- The departmental structure and administrative groupings will have an impact on what the Board will approve as an appropriate unit. For example, if the union attempts to carve out groups of employees from different areas – without regard to the employer's administrative structure – then it is likely that the unit will not withstand Agency scrutiny.

- Make sure that departments, and different departments located elsewhere in the store, have separate supervision and that there is no overlap. For example, in Neiman Marcus, the petitioned-for employees did not have the same direct supervision, while in Macy's, both the cosmetic and fragrance employees all had the same direct supervisor.

- Limit interchange and contact between departments or administrative groupings. Thus, in Neiman Marcus, there was no evidence that sales employees were asked to jump between sales jobs in "salon" and "contemporary" shoes. Accordingly, the unit was deemed inappropriate.

Where there is employee interchange between departments and daily contact between employees in different areas, it will indicate a community of interest among those employees' common working conditions.

On the other hand, an employer may argue that extensive interchange between employees in one department with other similar departments militates toward a finding of a wall-to-wall unit among those departmental employees. (This was an unsuccessful argument employed by Macy's when it cited "permanent interchange" between selling employees store wide).

Regardless of these suggestions, it is apparent that employers who are targeted by unions in narrowly drawn units face a daunting task, at least in the short term, to overcome the *Specialty Healthcare* ruling*.*

EEO Tips: Has Age Discrimination Become a Faded Issue?

This article was prepared by Jerome C. Rose, EEO Consultant for the law firm of LEHR, MIDDLEBROOKS, & VREELAND, P.C. Prior to his association with the firm, Mr. Rose served for over 22 years as the Regional Attorney for the Birmingham District Office of the U.S. Equal Employment Opportunity Commission (EEOC). As Regional Attorney Mr. Rose was responsible for all litigation by the EEOC in the states of Alabama and Mississippi. Mr. Rose can be reached at 205.323.9267.

During FY 2008, age discrimination charges constituted almost 26% of all charges filed with the EEOC. Since that time, ADEA charges have slipped to approximately 23% of all charges filed and may be falling even more. It is noteworthy that in FY 2006, the EEOC filed 50 ADEA lawsuits (about one out of every seven merit suits filed that year), but in FY 2013, the EEOC only filed seven ADEA lawsuits (one out of every 19 it filed that year). And, from all indications, the agency will file about the same number in FY 2014. For example, according to EEOC Press Releases, only eight ADEA cases have been filed in FY 2014 through August 20th. Obviously, something has affected (or infected) the viability of ADEA charges and cases in the battle to overcome age discrimination. That something appears to be the Supreme Court's holding in the case of *Gross v. FBL Financial Services, Inc.* (S. Ct. June 2009). That holding can be summarized briefly as follows:

On June 18, 2009, the U.S. Supreme Court, Justice Clarence Thomas writing the majority 5/4 opinion, decided the case of *Gross* and essentially wiped out any shifting of the burdens of proof with respect to "mixed motive" cases under the Age Discrimination in Employment Act (ADEA). Specifically, the Court held that "A plaintiff in bringing an ADEA disparate treatment claim must prove by a preponderance of the evidence that age was the "but for" cause of the challenged adverse employment action. The burden of persuasion does not shift to the employer to show that it would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in that decision."

According to Justice Thomas, the U.S. Congress failed to amend the ADEA at the same time that it amended Title VII by way of the Civil Rights Act of 1991 to provide for mixed motive claims in an effort to correct the Supreme Court's holding in *PriceWaterhouse v. Hopkins*. In actuality, Title VII was amended by adding Section 42 U.S.C. 2000e-2(m), which provides that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." Also, under the Civil Rights Act of 1991, a new section was added to Title VII, namely Section 2000e-5(g)(2)(B), the so-called burden shifting section, which limited a plaintiff's remedies if the employer could show that it would have made the same decision notwithstanding the unlawful considerations.

Justice Thomas in the *Gross* case stated "The Court had never held that this burden-shifting framework applies to ADEA claims. And we decline to do so now." Actually, the question put to the Court upon *certiorari* was whether a plaintiff must present direct evidence of discrimination in order to obtain a mixed motive instruction in a non-Title VII discrimination case. The Court never answered that question. Instead, Justice Thomas answered the question of whether the burden of persuasion ever shifts to the party defending an alleged mixed motive discrimination claim brought under the ADEA. As stated above, the Court found that it does not.

The practical implications of the holding in *Gross* lean heavily in favor of employers. For example:

1. It simplifies an employer's defense with respect to mixed motive cases under the ADEA. It allows an employer to concentrate its defense on "reasonable factors other than age," presumably based upon business necessity, without also having to show that its decision would have been the same whether or not age was a factor.

2. It establishes a higher level of proof for a plaintiff to show that "but for" the employee's (or applicant's) age, the adverse decision would not have been made. The "but for" standard almost requires direct evidence (or something close to an admission by the employer) that age was the motivating factor in making the decision. At any rate, this kind of proof is more likely to be available to defendant-employers than to plaintiff-claimants because it usually involves the subjective mental processes of the supervisor, manager or other decision maker. Even if the decision maker admits that the plaintiff's age crossed his or her mind, that would not necessarily prove that the decision would not have been made "but for" the employee's or applicant's age.

3. There is no shifting of any burden of proof or burden of going forward for the employer at any point along the way. The entire burden of persuasion is upon the plaintiff at all times.

However, there are also some potential negative implications of the Court's holding which do not favor employers. For example:

1. It may complicate an employer's defense of a case in which the plaintiff alleges both Title VII and age claims in the same action based upon essentially the same facts. For instance, if the allegations include both race and age, or sex and age, an employer must be prepared to defend the race or other Title VII portions of the case using the shifting burdens under *PriceWaterhouse* or Section 2000e-2(m) and 2000e-5(g)(2)(B) of Title VII, while the age portion of the case must be defended according to the standards set forth in Gross. It is likely that in most cases the same basic evidence, including witnesses' testimony, will have to be used (in different ways) to prove or disprove the allegations under each statute.

2. It is also unclear whether *Gross* will apply to state age discrimination laws. This creates a potential choice of forum problem if a plaintiff decides to file his or her age claims in state court and his or her Title VII claims in a federal district court.

While there may not be a direct correlation between the Supreme Court's holding in *Gross* and the EEOC's processing of ADEA charges, there is strong evidence that during the last five years (FY 2009 – FY 2013) that decision, perhaps more than anything else, had a significant impact on the number of ADEA charges being filed and the litigation of such charges by the EEOC. The following tables show the overall record of what has happened to ADEA charges filed with the agency and resolved through the administrative process and/or through litigation:

ADEA Charge Resolutions Through The EEOC's Administrative Process FY 2009 – FY 2013					
Item	FY 2009	FY 2010	FY 2011	FY 2012	FY 2013
Total # All Charges	**93,277**	**99,922**	**99,947**	**99,412**	**93,727**
ADEA Total Charges	**22,778**	**23,264**	**23,465**	**22,857**	**21,396**
% (of Total)	24.4%	23.3%	23.5%	23.0%	22.8%
No Reasonable Cause	**12,788**	**16,308**	**17,454**	**19,239**	**15,113**
% (of ADEA)	62.3%	65.8%	66.9%	70.4%	67.6%
Reasonable Cause	**614**	**753**	**796**	**770**	**539**
% (of ADEA)	3.0%	3.0%	3.1%	2.8%	2.4%
Merit Resolutions	**3,710**	**4,325**	**4,396**	**4,051**	**3,616**
% (of ADEA)	18.1%	17.4%	16.9%	14.8%	16.2%
ADEA Monetary Benefits (in Millions)	**$72.1**	**$93.6**	**$95.2**	**$91.6**	**$97.9**
Average Per Merit Resolution	$19,434	$21,642	$21,656	$22,612	$27,075

From the above table, it can be seen that since 2009, the number of ADEA charges filed with the EEOC and disposed of through its administrative process has remained basically stagnant. However, it is also evident that there has been a slight decline in the percentage of ADEA charges filed each year compared to the total number of charges filed under all statutes. For example, in FY 2009, ADEA charges made up 24.4% of the total number of charges filed and that percentage has slowly declined to 22.8% in FY 2013. This is not a major falling off but the decline is evident. During this same period the percentage of ADEA "No Cause" findings has steadily increased from 62.3% in FY 2009 to a high of 70.4% in FY 2012. The 67.6% No Cause rate in FY 2013 was the second highest rate of "No Causes" during the five-year period in question.

Perhaps the surprising statistic was that, notwithstanding all of the other decreases, there was an increase in the amount of average monetary benefits obtained per "merit resolution". The average amount of monetary benefits obtained for each merit resolution increased from $19,434 in FY 2009 to $27,075 in FY 2013. Incidentally, the overall amount of monetary benefits obtained in FY 2013 through the administrative process of $97.9 million from ADEA charges in FY 2013 was a record. Thus, although the number of charges seems to be decreasing, the monetary benefits obtained by the EEOC in these cases seem to be going up.

In contrast to the slight decline in the number of ADEA charges filed during the last five-year period, the following table shows that there was a dramatic decline in the number of ADEA cases the EEOC selected for litigation during the same period:

ADEA Litigation Statistics FY 2009 – FY 2013					
Item	FY 2009	FY 2010	FY 2011	FY 2012	FY 2013
Total Merit Suits Filed – All Statutes	**281**	**250**	**261**	**122**	**131**
Merit Suits Filed with ADEA Claims	**24**	**29**	**26**	**12**	**7**
ADEA Suits Resolved	**38**	**38**	**26**	**30**	**16**
ADEA Monetary Benefits (in Millions)	**$6.7**	**$5.3**	**$8.4**	**$3.6**	**$2.1**
Average Monetary Benefits Per Merit Resolution	$176,316	$139,474	$323,077	$120,000	$131,250

In FY 2013, the EEOC filed only seven ADEA cases. This was the lowest number of ADEA cases filed by the Commission in at least the last ten years. EEOC statistics show that the number of cases filed during the last five years was also the lowest number of ADEA cases filed in any five-year period since at least 1997. (Litigation statistics for ADEA cases prior to 1997 were not available).

According to the EEOC's press releases on suits filed through August 20, 2014, FY 2014 may not be much better than FY 2013 with respect to ADEA cases filed by the EEOC. The Press Releases show that through August 20, 2014, the EEOC had filed only eight ADEA cases. Another month and a half remains in the EEOC's fiscal year 2014 and the current statistics could change due to the Agency's efforts, historically, to close out as many cases pending in the administrative process as possible in the last month of each fiscal year.

Incidentally, EEOC statistics show that the Agency found "reasonable cause" on 770 ADEA charges processed in FY 2012 and on 539 ADEA charges process in FY 2013. The statistics also show that there were, respectively, 427 and 318 unsuccessful conciliations in FY 2012 and FY 2013. Thus, on face value, it would seem that the EEOC potentially had over 700 cases to use as "litigation vehicles" if it chose to do so. But, instead, it decided to litigate only 12 cases in FY 2012 and only seven cases in FY 2013. That, in and of itself, is making a statement. If the EEOC will not litigate ADEA cases, then who will? Unfortunately, a comprehensive listing of ADEA cases filed by the private bar nationwide in any one year is not easily available. Otherwise, we might have an answer to the previous question. However, our suspicion is that the private bar is not picking up all of the cases declined by the EEOC.

There may be many explanations for the small number of ADEA cases filed by the EEOC in FY 2013 and similarly for the apparently miniscule production of ADEA cases filed so far in FY 2014. However, it would seem irrational to overlook the impact of *Gross* on the EEOC's litigation program and upon the whole issue of age discrimination.

This impact was recognized by some members of Congress. On March 13, 2012, Senators Grassley and Leahy introduced a version of the "Protecting Older Workers Against Discrimination Act" in the U.S. Senate which was specifically intended to "revive the vital civil rights protections" of older workers which had been removed or limited by the Supreme Court's decision in *Gross*. Likewise, on July 30, 2013, Representative George Miller introduced H.B. 2852 (113th Congress, 2013-2014) entitled "Protecting Older Workers Against Discrimination Act," which was a similar version of the act which had been introduced in the Senate. In substance, this bill also was intended to correct the negative effects of the Supreme Court's holding in *Gross* on plaintiffs under the ADEA as to mixed motive cases. Among other things, this act specifically provides that "a complaining party shall not be required to demonstrate that age or retaliation was the sole cause of a practice (thereby rejecting the Supreme Court's decision in *Gross*, which requires a complainant to provide that age was the "but for" cause for the employer's decision). There seemed to be some bi-partisan support for these bills, but presently both the Senate and House versions are still in committee. It would be our guess that neither of the bills will be passed anytime in the near future.

In the meantime, given the apparent reluctance of the EEOC to litigate ADEA cases involving individual harm as indicated by the relatively small numbers of such cases which have been selected for litigation during the last few years, it would seem that the issue of age discrimination has definitely been put on a back burner.

If you have any questions on age discrimination, please do not hesitate to call this office at 205.323.9267.

OSHA Tips: How Not To Deal With OSHA

This article was prepared by John E. Hall, OSHA Consultant for the law firm of Lehr Middlebrooks & Vreeland, P.C. Prior to working with the firm, Mr. Hall was the Area Director, Occupational Safety and Health Administration and worked for 29 years with the Occupational Safety and Health Administration in training and compliance programs, investigations, enforcement actions and setting the agency's priorities. Mr. Hall can be reached at 205.226.7129.

An OSHA press release dated July 16, 2014, described in detail how an employer made the outcome of an inspection of their site far worse. OSHA's caption to the release read as follows:

"Formed Fiber Technologies provides false statement documentation, continues to expose workers to serious hazards resulting in $816,500 fine. OSHA previously cited Ohio fabric manufacturing plant in October 2013."

After providing false documentation and making false representations claiming that previously cited hazards related to hydraulic presses had been corrected, Formed Fiber Technologies LLC has been issued 14 safety citations including willful and repeat citations, as well as a notice of failure to abate with proposed fines totaling $816,500. OSHA initiated the inspection as a follow up inspection pursuant to the agency's Severe Violators Enforcement Program.

The plant, which produces motor vehicle interior trimmings for automotive manufacturers, including Toyota and General Motors, was issued one failure to abate, nine willful and four repeat safety violations for continuously exposing employees to amputations and other hazards.

"Formed Fiber Technologies apparently decided that production was more important than ensuring the workers' safety. They provided statement documentation to OSHA. They knew how hazardous these machines were without proper safeguards and also knew exactly how to fix those hazards," said Assistant Secretary of Labor for Occupational Safety and Health, Dr. David Michaels.

Nine willful citations were issued for failing to prevent the start up of multiple hydraulic presses, laminator machines and robot cells while workers were performing set-up, service and maintenance inside the machines. The company also failed to develop proper lockout/tagout procedures and encouraged workers to use unsafe methods to stop machines for maintenance. A willful violation is one committed with intentional knowing or voluntary disregard for the law's requirement or plain indifference to employee safety and health.

Four repeat violations cited also involve failing to train workers on how to properly stop machines before service and maintenance, which continuously exposed machine operators to lacerations, amputations, burns, and having parts of the machine strike or crush them. The company failed to have identifying information on devices to indicate hazards.

OSHA previously cited Formed Fiber Technologies in October 2013 for eleven violations, many involving the same standards. The company entered into a settlement agreement that included terms involving the abatement of hazards and paying a penalty of $69,000. Prior to October 2013, the company had been inspected by OSHA sixteen times at their facilities nationwide resulting in 80 violations being cited.

Wage and Hour Tips: When Is Travel Time Considered Work Time?

This article was prepared by Lyndel L. Erwin, Wage and Hour Consultant for the law firm of Lehr Middlebrooks & Vreeland, P.C. Mr. Erwin can be reached at 205.323.9272. Prior to working with Lehr Middlebrooks & Vreeland, P.C., Mr. Erwin was the Area Director for Alabama and Mississippi for the U. S. Department of Labor, Wage and Hour Division, and worked for 36 years with the Wage and Hour Division on enforcement issues concerning the Fair Labor Standards Act, Service Contract Act, Davis Bacon Act, Family and Medical Leave Act and Walsh-Healey Act.

As previously reported, there continues to be much litigation under the Fair Labor Standards Act (FLSA). According to statistics from the U.S. District Courts, there were over 8,000 FLSA lawsuits filed in Federal District Court during the past year. This is a large increase from the approximately 1,500 filed in 2001.

One of the most confusing areas of the FLSA is determining whether travel time is considered work time. The following provides an outline of the enforcement principles used by Wage and Hour to administer the Act. These principles, which apply in determining whether time spent in travel is compensable time, depend upon the kind of travel involved.

Home to Work Travel: An employee who travels from home before the regular workday and returns to his/her home at the end of the workday is engaged in ordinary home to work travel, which is not work time.

Home to Work on a Special One-Day Assignment in Another City: An employee who regularly works at a fixed location in one city is given a special one-day assignment in another city and returns home the same day. The time spent in traveling to and returning from the other city is work time, except that the employer may deduct (not count) time the employee would normally spend commuting to the regular work site. Example: A

Huntsville employee who normally spends ½ hour traveling from his home to his work site that begins at 8:00 a.m. is required to attend a meeting in Montgomery that begins at 8:00 a.m. He spends three hours traveling from his home to Montgomery. Thus, the employee is entitled to 2½ hours (3 hours less the ½ hour normal home to work time) pay for the trip to Montgomery. The return trip should be treated in the same manner.

Travel That is All in the Day's Work. Time spent by an employee in travel as part of his/her principal activity, such as travel from job site to job site during the workday, is work time and must be counted as hours worked.

Travel Away from Home Community. Travel that keeps an employee away from home overnight is considered as travel away from home. It is clearly work time when it cuts across the employee's workday. The time is not only hours worked on regular working days during normal working hours but also during corresponding hours on nonworking days. As an enforcement policy, Wage and Hour does not consider as hours worked that time spent in travel away from home outside of regular working hours as a passenger on an airplane, train, boat, bus, or automobile.

Example – An employee who is regularly scheduled to work from 9:00 a.m. to 6:00 p.m. is required to leave on a Sunday at 3:00 p.m. to travel to an assignment in another state. The employee, who travels via airplane, arrives at the assigned location at 8:00 p.m. In this situation, the employee is entitled to pay for three hours (3:00 p.m. to 6:00 p.m.) since it cuts across his normal workday, but no compensation is required for traveling between 6:00 p.m. and 8:00 p.m. If the employee completes his assignment at 6:00 p.m. on Friday and travels home that evening, none of the travel time would be considered as hours worked. Conversely, if the employee traveled home on Saturday between 9:00 a.m. and 6:00 p.m., the entire travel time would be hours worked.

Driving Time: Time spent driving a vehicle (either owned by the employee, the driver or a third party) at the direction of the employer transporting supplies, tools, equipment or other employees is generally considered hours worked and must be paid for. Many employers use their "exempt" foremen to perform the driving in order not to have to pay for this time. If employers are using nonexempt employees to perform the driving, they may establish a different rate for driving from the employee's normal rate of pay. For example, if you have an equipment operator who normally is paid $20.00 per hour, you could establish a driving rate of $10.00 per hour and thus reduce the cost for the driving time. The driving rate must be at least the minimum wage. However, if you do so, you will need to remember that both driving time and other time must be counted when determining overtime hours and overtime will need to be computed on the weighted average rate.

Riding Time: Time spent by an employee in travel, as part of his principal activity, such as travel from job site to job site during the workday, must be counted as hours worked. Where an employee is <u>required</u> to report at a meeting place to receive instructions or to perform other work there, or to pick up and to carry tools, the travel from the designated place to the work place is part of the day's work, and must be counted as hours worked regardless of contract, custom, or practice. If an employee normally finishes his work on the premises at 5:00 p.m. and is sent to another job, which he finishes at 8:00 p.m. and is required to return to his employer's premises arriving at 9:00 p.m., all of the time is working time. However, if the employee goes home instead of returning to his employer's premises, the travel after 8:00 p.m. is home-to-work travel and is not hours worked.

The operative issue with regard to riding time is whether the employee is <u>required</u> to report to a meeting place and whether the employee performs any work (i.e., receiving work instructions, loading or fueling vehicles, etc.) prior to riding to the job site. If the employer tells the employees that they may come to the meeting place and ride a company-provided vehicle to the job site, and the employee performs no work prior to arrival at the job site, then such riding time is not hours worked. Conversely, if the employee <u>required</u> to come to the company facility or performs any work while at the meeting place, then the riding time becomes hours worked that must be paid for. In my experience, when employees report to a company facility, there is the temptation for managers to ask one of the employees to assist with loading a vehicle, fueling the vehicle or some other activity, which begins the employee's workday and thus makes the riding time compensable. Therefore, employers should be very careful that the supervisors do not allow these employees to perform any work prior to riding to the job site. Further, they must ensure that the employee performs no work (such as unloading vehicles) when he returns to the facility at the end of his workday in order for the return riding time to not be compensable. Recently, an employer told me that, in an effort to prevent the employees performing work before riding to a job site, he would not allow the employees to enter their storage yard but had the supervisor pick the employees up as he began the trip to the job site. In the afternoon, the employees were dropped off outside of the yard so they would not be performing any work that could make the travel time compensable.

On a separate issue that is important for those employers having government contracts that are subject to the Service Contracts Act, Wage and Hour issued the annual update of the fringe benefits that are required. For all contracts where invitations for bids were opened or contracts awarded after July 22, 2014, the basic rate is increased to $4.02 per hour. Thus, employers need to take the revised rate into consideration when preparing a bid for future contracts.

If you have questions or need further information, do not hesitate to contact me.

2014 Upcoming Events

EFFECTIVE SUPERVISOR®

Birmingham - September 25, 2014
Rosewood Hall, SoHo Square

Auburn - October 21, 2014
The Hotel at Auburn University and
Dixon Conference Center

Huntsville - October 23, 2014
U.S. Space & Rocket Center

2014 LMV Employee Relations Summit

Date:	November 18, 2014
Time:	7:30 a.m. – 4:00 p.m.
Location:	Rosewood Hall, SoHo Square Homewood, AL 35209
Registration Fee:	Complimentary
Registration Cutoff Date:	November 13, 2014

To register, please contact Marilyn Cagle at 205.323.9263, mcagle@lehrmiddlebrooks.com.

Did You Know…

…that an employer violated the National Labor Relations Act by refusing to permit an employee to speak to a union representative about submitting to a drug test? *Ralphs Grocery Co.* (July 31, 2014). An employer has the right, according to the NLRB, to take action including termination when an individual behaves erratically which the employer believes may be due to the consumption of alcohol or drugs. However, an employee is protected from termination when requesting to speak with a union representative prior to taking a drug test. The company treated the employee's actions as a refusal to take the drug test and, therefore, he was terminated.

…that at its annual convention in Las Vegas on August 12, the United Steelworkers committed to "backyard" organizing to increase membership? According to the USW, there are approximately 50,000 employees covered by USW contracts who are not USW members. The USW is going to emphasize the importance of signing up those individuals to "pay their fair share." In an effort to organize non-union employees among employers where USW has contracts, USW will propose contract language to expand leave of absence provisions for organizing purposes. The union's goal is to add 100,000 new members, half from signing up non-members under contracts with union representation, and the other half from new bargaining units.

…that the EEOC alleges a Wisconsin energy company violated the ADA by terminating an employee who refused to participate in the company's wellness plan? *EEOC v. Orion Energy Sys., Inc.* (E.D. Wis., August 20, 2014). The EEOC alleged that an employee who declined to participate in the company's wellness program was penalized by paying a higher fee for health care insurance premiums than participants. The EEOC also alleged that questions about medical information as a part of the wellness program were not "voluntary," such as completing a health risk assessment form and providing a blood sample. When filing this lawsuit, the EEOC said that, "Employers certainly may have voluntary wellness programs . . . and many see such programs as a positive development. But they actually have to be voluntary. They can't compel participation by imposing enormous penalties such as shifting 100% of the premium cost for health benefits on to the back of the employee or by just firing the employee who chooses not to participate."

…that the State of Texas's lawsuit against the EEOC challenging the Commission's background check guidance was dismissed? *State of Texas v. EEOC* (N.D. Tex., August 20, 2014). The Court stated that, "Texas has not shown that the guidance is a final agency action, that any case or attempt at enforcement of the guidance has been brought against Texas by the Department of Justice, or that the claims raised herein are not seeking a premature adjudication in the abstract without any actual facts and circumstances relating to the employment practices at issue." Thus, because the EEOC's "guidance" is not an agency action that has the effect of a regulation, and because the Commission has not taken enforcement action based upon its guidance, there is no issue to justify a case against the EEOC on this matter.

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