- As always, documenting complaints or misconduct involving the employee can assist in supporting an employer's articulated reason for actions taken. Even though some complaints may seem trivial or embarrassing, they should nonetheless be documented to provide employer support in case they eventually become the basis for the employee's termination.

Amanda K. Baumle (Hou.)

RECENT ARTICLES

"Trade Secrets Law – Use of Written Agreements" by Nick Akerman and Andrew Lachow in *The National Law Journal*, December 11, 2000.

"New Affirmative Action Rules Affect Contractors" by Robert Nobile in the *New York Law Journal*, December 4, 2000

"Discretion and 'Truelove' Collide in Wages Cases" by Peter A. Walker, Mara-Louise Anzalone and H. Tor Christensen in the *New York Law Journal*, November 7, 2000.

"Religion in the Workplace: Courts Look to Sexual Harassment Jurisprudence for Guidance on Religious Harassment Claims" by Ted D. Meyer in *Texas Lawyer*, October 2, 2000.

"Employer on the Offensive: Combating Improper Employee Use of Voice Mail and Electronic Mail Systems" by James A. Burstein and William F. Dugan in *Employee Relations Law Journal*, Autumn 2000.

"Protecting Your Company's Most Valuable Assets: Losing A Key Employee Can Severely Damage Your Business by Linda C. Schoonmaker in *Texas Lawyer*, October 2, 2000.

"NLRB Restores Representation Rights to Temps" by Eric Rosenfeld in the *New York Law Journal* on September 25, 2000.

"What Changes in the Labor Exemptions from the Anti-Trust Laws Could Benefit the Business Community" by Ed Miller in the *Journal of Labor Research*, Fall 2000.

Editor's Note

In a recent article, we discussed issues concerning an in-house counsel's reaction to an employee who refuses to cooperate in an investigation without the presence of the employee's own lawyer. Because we cited California cases in our hypothetical scenario, we referred to "Calco," a generic-sounding term to indicate that the discussion would apply to any California corporation. We did not intend that term or the other fictional names used in the article to refer to any actual company or individual. Any resemblance of the names used to actual entities was purely coincidental. We regret any embarrassment caused to Calco Insurance Brokers & Agents, Inc.

ATLANTA
One Peachtree Pointe
1545 Peachtree Street, N.E., Suite 700
Atlanta, Georgia 30309-2401
404-892-6412
404-892-7056 fax

BOSTON
101 Federal Street, Suite 2500
Boston, Massachusetts 02110-1800
617-737-1900
617-737-6139 fax

CHICAGO
55 East Monroe Street, Suite 4200
Chicago, Illinois 60603-5803
312-346-8000
312-269-8869 fax

HOUSTON
700 Louisiana Street, Suite 3850
Houston, Texas 77002-2731
713-225-2300
713-225-2340 fax

LOS ANGELES
One Century Plaza
2029 Century Park East, Suite 3300
Los Angeles, California 90067-3063
310-277-7200
310-201-5219 fax

NEW YORK
1270 Avenue of the Americas, Suite 2500
New York, New York 10020-1801
212-218-5500
212-218-5526 fax

SACRAMENTO
400 Capitol Mall, Suite 2350
Sacramento, California 95814-4428
916-448-0159
916-558-4839 fax

SAN FRANCISCO
101 California Street, Suite 2900
San Francisco, California 94111-5858
415-397-2823
415-397-8549 fax

WASHINGTON, D.C.
815 Connecticut Avenue, N.W, Suite 500
Washington, D.C. 20006-4004
202-463-2400
202-828-5393 fax

BRUSSELS
Avenue Louise 500, Box 8
1050 Brussels, Belgium
011-(32)(2)647.60.25
011-(32)(2)640.70.71 fax

AFFILIATE FIRMS
Matray, Matray et Hallet
Brussels and Liege, Belgium
Cologne, Germany

LABOR & EMPLOYMENT REPORT
Volume XXXIV, No. 4 December 2000

SUPREME COURT REVIEW

High Court to Decide Important Labor & Employment Cases

When the U.S. Supreme Court commenced its current term in October, on its docket were a variety of cases involving important labor and employment law issues. As of press time (following its historic opinion on Florida vote recounts), the court had agreed to hear several other cases recently added to its expanding docket. Overall, this Supreme Court term, which will end in June 2001, promises to have special interest and significance for labor and employment law. Here is a brief rundown on key labor and employment law cases the court has agreed to review.

Federal Arbitration Act and Employment Contracts

Circuit City Stores, Inc. v. Adams, 194 F.3d 1070 (9th Cir. 1999), *cert. granted*, 120 S.Ct. 2004 (May 22, 2000) (No. 99-1379).

Facts: When applying for a job at Circuit City, the applicant completed and signed a six-page application that included a document titled *Circuit City Dispute Resolution Agreement*. The agreement, which was mandatory for all employees, required employees to submit all claims and disputes to mutually binding arbitration. After the plaintiff sued Circuit City and three of its supervisors in state court for sexual harassment based on his sexual orientation, Circuit City petitioned the U.S. District Court to stay the state-court action and enforce the arbitration agreement. The District Court agreed with Circuit City, stayed the state-court proceeding, and sent the case to arbitration. However, the 9th U.S. Circuit Court of Appeals reversed the District Court, holding that, because the agreement was required to be signed as a condition of employment, it was an employment contract not covered by the Federal Arbitration Act, and thus the District Court had no authority to compel arbitration.

Questions before the Supreme Court: Does the Federal Arbitration Act apply to employment contracts, and does the state retain its right to regulate arbitration agreements?

Eleventh Amendment and the ADA, Rehabilitation Act and FMLA

University of Alabama at Birmingham Bd. of Trustees v. Garrett, 193 F.3d 1214 (11th Cir. 1999), *cert. granted*, 120 S.Ct. 1669 (April 17, 2000) (No. 99-1240).

Facts: Two state employees brought Americans with Disabilities Act (ADA), Rehabilitation Act and Family and Medical Leave Act (FMLA) claims against the trustees of a state university in federal court. (The 11th U.S. Circuit Court of Appeals only discussed the facts of the FMLA claim alleged by one plaintiff.) The plaintiff took a leave of absence under the FMLA for treatment for cancer. One week after she returned from her leave of absence, the company demoted her and gave her a significantly lower salary. The plaintiff also alleged that while undergoing treatment, her supervisor made negative comments regarding her illness, threatened to transfer her to a less demanding job due to her condition and informed her that she would be permanently replaced unless she took leave. The 11th Circuit ruled that the state did not have 11th Amendment immunity from suits brought under the ADA or the Rehabilitation Act. However, the court held that the state did have 11th Amendment immunity from suits based on the relevant specific provisions of the FMLA.

SEYFARTH ATTORNEYS SHAW

In this issue:

Question before the Supreme Court: Does the 11th Amendment bar private federal suits by state employees under the Americans With Disabilities Act, the Rehabilitation Act, and/or the Family and Medical Leave Act?

Overturning Arbitration Decisions

Eastern Associated Coal Company v. United Mine Workers, District 17, 188 F.3d 501 (4th Cir. 1999), *cert. granted*, 120 S.Ct. 1416 (March 20, 2000) (No. 99-1038).

Facts: Required to have a commercial driver's license to operate heavy equipment, employee Smith was subjected to a random drug test and tested positive for cannabinoids. As a result of the test, he was suspended and eventually discharged. An arbitrator ruled that Smith must be returned to work after a 30-day suspension. In addition, the arbitrator required Smith to take part in a substance-abuse program and be subject to random drug testing. Later, Smith again tested positive for cannabinoids and was discharged. A subsequent arbitrator found that Smith's lapse in his abstinence from recreational drug use was an isolated occurrence caused by a family problem. Thus, the arbitrator issued an award suspending Smith, but then reinstating him subject to certain conditions, including that he would provide a signed, undated letter of resignation that would be dated and accepted if he tested positive for any illegal drug, or refused to submit to a drug test, in the following five years. The employer sought to have the award vacated, based on a violation of public policy. Both the District Court and the appellate court held that, because neither the collective-bargaining agreement nor the company's substance-abuse policy mandated discharge as a punishment for testing positive for illegal drugs, the arbitrator could have rationally concluded that there was no just cause for discharge.

Question before the Supreme Court: Under what circumstances can an arbitrator's decision to retain an employee in a safety-sensitive job despite the employee's testing positive for drug use—be overturned?

Supervisory Status of Registered Nurses

NLRB v. Kentucky River Community Care, Inc., 193 F.3d 444 (6th Cir. 1999), *cert. granted*, 2000 WL 655750 (Sept. 26, 2000) (No. 99-1815).

Facts: Six registered nurses working at a residential mental health facility attempted to organize into a union. The registered nurses directed licensed practical nurses in dispensing medication, served as the highest-ranking employees in the building during the evening and night shifts, could ask workers to come in early or stay late, moved workers between shifts, and had the authority to write up employees who did not cooperate with staffing assignments. The employer claimed that the nurses should be excluded from organizing because they were supervisors and thus did not qualify under the National Labor Relations Act (NLRA). Rejecting the decision of the National Labor Relations Board (NLRB) granting union certification, the 6th U.S. Circuit Court of Appeals found that, based on their duties, the nurses were supervisors under the act. The court also rejected the board's decision that the party alleging an employee is a supervisor bears the burden of proving supervisor status.

Questions before the Supreme Court: What constitutes an exercise of "independent judgment" that makes the employee a "supervisor" under Section 2(11) of the NLRA? Who bears the burden of proving an individual's supervisory status?

> "... this Supreme Court term (which ends in June 2000) promises to be an interesting and significant one in labor and employment law."

Prevailing Wage Dispute

Bradshaw v. G & G Fire Sprinklers Inc., 204 F.3d 941 (9th Cir. 2000), *cert. granted*, 2000 WL 1053565 (Oct. 10, 2000) (No. 00-152).

Facts: For California public works contracts, the prime contractor must agree to pay prevailing wages to its construction workers and those of any subcontractor that is selected for the project. The state labor code provision authorizes the state to direct the contracting agency to withhold worker underpayments and impose penalties if public contractors fail to pay the state-determined prevailing wages. If the offender is a subcontractor, the state withholds funds from the prime contractor, which then withholds money from the subcontractor. Generally, the subcontractor's only recourse is a suit against the prime contractor. The 9th U.S. Circuit Court of Appeals held the California law unconstitutional under the 14th Amendment Due Process Clause because the state did not hold a hearing before directing that contract payments be withheld from a subcontractor.

Question before the Supreme Court: Does California's law authorizing the withholding of payment and the imposition of penalties without a hearing—for a subcontractor's failure to comply with prevailing wage requirements on a state contract—violate the 14th Amendment?

State Agencies Using English-Only Rules

Alexander v. Sandoval, 197 F.3d 484 (11th Cir. 1999), *cert. granted*, 2000 WL 718812 (Sept. 26, 2000) (No. 99-1908).

Facts: Alabama amended its Constitution in 1990, making English its official language. The Department of Public Safety, which was responsible for administering driver's license examinations, consequently adopted an English-only policy, requiring all portions of the driver's license examination, including the written exam, to be executed only in English. Respondent went to take her driver's license test, but did not complete it because she neither speaks nor writes English. Respondent alleged a violation of Title VI of the Civil Rights Act of 1964, which prohibits discrimination by recipients of federal grants, such as Alabama. The lower court found none of Alabama's reasons for its English-only policy to be "substantial, legitimate justifications," and further found that "the regulation had an impermissible, disparate impact on the basis of national origin in violation of Title VI."

Question before the Supreme Court: Can private citizens sue state agencies for administering federal grants in a manner that has the effect of discriminating on the basis of ethnicity?

ERISA (Employee Retirement Income Security Act)

Egelhoff v. Egelhoff, 989 P.2d 80 (Wash. 1999), *cert. granted*, 120 S.Ct. 2687 (June 19, 2000) (No. 99-1529).

Facts: During their four-and-one-half-year marriage, David Egelhoff designated Donna Egelhoff as beneficiary under his Disability and Life Insurance Plan and his Defined Contribution Profit Sharing Plan. The couple divorced, and in a document incorporated into the divorce decree he was awarded 100 percent of his retirement 401(k) and IRA. Two months later, David was involved in an automobile accident and died instantly. At the time of his death, Donna remained the beneficiary of record of both his life insurance policy and pension plan. The proceeds of the plans were paid to her, and David's children from his first marriage filed suit to recover the life-insurance proceeds and the pension-plan proceeds from Donna, arguing that Washington law revoked her designation as beneficiary. The lower court granted summary judgment in

favor of Donna based on ERISA. However, the state appellate court reversed, holding that Washington law operated without a connection with or reference to ERISA and thus controlled the issue. The Washington Supreme Court upheld the appellate court judgment.

Question before the Supreme Court: Can ERISA pre-empt a state law that purports to revoke the designation of beneficiary made pursuant to the terms of an ERISA plan?

ERISA

Reynolds Metals Co. v. Ellis, U.S. No. 99-1787, *cert granted* November 27, 2000.

Facts: The Supreme Court has agreed to review a 9th U.S. Circuit Court of Appeals decision that a fiduciary of a health-benefit plan covered by ERISA may not sue a beneficiary under the act to enforce a plan-reimbursement provision. In this case, Ellis was paid medical expenses under the plan for injuries received in an auto accident. He later received a substantial settlement on his claim against the person responsible for the accident. When he refused to reimburse the health plan for the medical expenses, Reynolds sued under a subrogation clause in the plan to recover those expenses paid out by the plan. The 9th Circuit affirmed the dismissal of the case on the grounds that Reynolds' reimbursement claim was not a claim for equitable relief under Section 502(a)(3) of ERISA.

Question before the Supreme Court: Can a fiduciary of an ERISA health-benefit plan sue a beneficiary under the act to enforce a subrogation provision in the plan?

Gerald D. Skoning (Chi)
Elizabeth A. Tabor (Chi)

Guest Client Corner

[The "Guest Client Corner" is an occasional feature in this newsletter. The following article by Jill Goldy originally appeared in a recent issue of *The Illinois Labor Letter*. It is reprinted with permission. Ms. Goldy is Vice President and Director, Labor and Employment Law for Motorola, Inc.]

Recent Developments in Employee Safety and the ADA

The Americans with Disabilities Act (ADA) prohibits employers from discriminating against employees on the basis of a disability. It also requires employers to reasonably accommodate individuals with disabilities, when doing so would allow those individuals to adequately perform the essential functions of their jobs or positions for which they have applied.

Notwithstanding these fundamental requirements, the ADA explicitly exempts employers from their duty to reasonably accommodate or to employ disabled individuals if doing so would pose a "direct threat" to the health or safety of other individuals in the workplace. Indeed, even job qualification standards that tend to deny jobs or benefits to individuals with disabilities are lawful if they are legitimately and objectively designed to remove such direct safety threats from the workplace.

This article examines some important developments on this subject and offers practical tips for employers.

A Direct Threat to Safety

To establish that safety considerations outweigh the obligation to place or accommodate individuals with disabilities, the employer generally must show that based on objective medical or other evidence, the individual cannot presently perform the job's essential functions with a sufficient level of safety. The strength of this defense increases with the employer's ability to establish that the risk of harm is high, that there is an ongoing risk and that the harm would likely be severe.

The Equal Employment Opportunity Commission (EEOC) has emphasized in its *Interpretive Guidance* that an employer may not deny employment to an individual with a disability "merely because of a slightly increased risk . . . [t]he risk can only be considered when it poses a *significant* risk, i.e., high probability of substantial harm; a speculative or remote risk is insufficient." Generalized fears that an employment environment might exacerbate a disability are likely to be inadequate.

An individual's violent, aggressive, destructive or threatening behavior may itself constitute evidence of a direct threat. However, an individual does not pose a threat simply by virtue of having a history of (or being treated for) a psychiatric disability. Nor does an individual necessarily pose a direct threat in operating machinery because he or she takes medicine that may have side effects that include diminishing concentration or coordination.

A workers' compensation or Social Security Administration determination of permanent or total disability will not necessarily affect an employer's duty to return the employee to work. Such a finding, however, may provide relevant evidence of a direct threat, where an employer can demonstrate the specific aspects of the employee's disability that would pose a direct threat.

Once an individual with a disability is deemed to pose a direct threat, the employer must still determine whether a reasonable accommodation exists that might sufficiently reduce or eliminate the risk of harm. In making this determination, the employer should generally abide by existing guidelines regarding the reasonable accommodation process. However, if no reasonable accommodation would be effective (or the individual refuses to accept an effective accommodation, fails to take medication, fails to obtain medical treatment, or fails to use an assistive device that would reduce the threat to an acceptable level), he or she generally is deemed unqualified and may be excluded from the job in question.

Safety of Self or Others

In describing the direct threat concept, the ADA only speaks in terms of a significant risk to the health or safety of others. However, the EEOC's implementing regulations broaden the definition of direct threat to include situations in which an individual poses a substantial risk of harm to the health or safety of him- or herself or others.

This conflict between the statute and regulations has left employers uncertain about their legal obligations. For example, may an employer refuse to hire an employee with a heart condition that the employer thinks will be aggravated by his or her job duties?

In *Echazabal v. Chevron USA, Inc.*, the 9th U.S. Circuit Court of Appeals specifically addressed whether an employer may exclude a disabled individual from a position that poses a threat to his or her own safety but not to the safety of others. Chevron had refused to hire an employee with Hepatitis C for a position that involved exposure to chemicals that might further damage his liver.

The 9th Circuit examined the plain language of the ADA and its legislative history to determine the intended application of the direct-threat provision. As noted, the statutory language offers a defense to employers only if an employee's work would pose a direct threat to the safety of others.

Acknowledging Congress's view that disabled individuals should be afforded the opportunity to determine what risks to undertake, the court rejected both the EEOC's and Chevron's interpretation of the ADA. In an opinion that seems out of touch with current workplace realities, the 9th Circuit held that Chevron could not refuse to hire an individual for a position that created a safety risk only for him or her.

The court rejected Chevron's argument that requiring an employer to hire an applicant who was likely to injure himself would subject the employer to greater liability (as the individual may later attempt to sue the employer for the injury). The court also noted that to the extent Chevron's fear of such a damages award reflects a fear that hiring a disabled individual would cost more than hiring a nondisabled individual, such extra costs do not provide an affirmative defense to a discriminatory refusal-to-hire suit. Finally, the court held that Chevron's consideration of the individual's safety was not related to his ability to perform the essential functions of the job.

Business Necessity

To what extent does an employer have the prerogative to formulate and rely upon safety-based job qualifications, even though they may screen out individuals with disabilities? In *EEOC v. Exxon Corporation*, the 5th U.S. Circuit Court of Appeals examined Exxon's policy of permanently removing employees who had undergone treatment for substance abuse from safety-sensitive positions in which employees received minimal supervision (about 10 percent of Exxon's positions).

A federal judge had held that the employer's only available defense to an employment standard that screens out disabled individuals was to prove that employees subject to the policy posed a direct threat to the safety of others. In a very favorable decision for employers, the 5th Circuit reversed this decision, holding that an employer could also defend the selection standard as a business necessity.

Exxon had adopted its substance-abuse policy after the *Valdez* incident (in which the tanker captain's alleged alcoholism may have contributed to the oil spill). Exxon claimed that its policy:

- Promotes safety in positions where Exxon could not oversee whether employees might be suffering a relapse;
- Furthers environmental protection goals;
- Protects against future tort liability; and
- Promotes appropriate corporate citizenship.

Exxon argued that a safety-based qualification standard may be defended either as a direct threat or a business necessity, both of which are defenses recognized under the ADA. The EEOC relied on its *Interpretive Guidance* to argue that direct threat is the only appropriate defense: "With regard to safety-sensitive requirements that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities, an employer must demonstrate that the requirement, as applied to the individ-

ual, satisfies the 'direct threat' standard . . . in order to show that the requirement is job related and consistent with a business necessity."

The 5th Circuit noted that the ADA defines the two defenses differently, suggesting that *business necessity* applies to across-the-board rules, while direct threat addresses a standard imposed on a particular individual. The court also relied on the legislative history of the ADA to support this conclusion. In evaluating whether the risks addressed by a safety-based qualification standard constitutes a business necessity, the court continued, the magnitude of possible harm and the probability of occurrence must be considered.

Workplace Misconduct

Additional issues arise when an employee's behavior is tied to a disability-usually a mental disability-and that behavior constitutes misconduct under the employer's policies or work rules. This issue may arise when an employee has engaged in threatening or even violent behavior toward co-workers. Although there have been a few aberrational decisions on this point, if the behavior is serious enough, the courts generally have upheld the employer's right to take disciplinary action (up to and including discharge) without first reasonably accommodating the employee's disability.

> "... although the statute (ADA) is designed to protect disabled individuals from discriminatory employment practices, this noble goal was not meant to be achieved at the cost of workplace or public safety."

Newberry v. East Texas State University (another decision issued by the 5th Circuit) is a good example. Newberry, a faculty member at East Texas State University, was terminated for engaging in threatening and nasty behavior. When Newberry sued, he alleged that he was terminated because of a perceived psychiatric problem.

The court held that the employer was justified in terminating Newberry, stating: "Where an employee engages in conduct that is legitimately a basis for dismissal, and the employer believes that the employee's conduct is symptomatic of disability, the employer may terminate the employee on the basis of the conduct itself, so long as the collateral assessment of disability plays no role in the decision to dismiss." In this situation, it was not necessary to provide a reasonable accommodation, even though a disability may have played a part in the misconduct.

The Implications

Given a continuing difference of opinion in the courts as to which party carries the burden of proof in direct-threat cases, a good rule of thumb is to approach safety issues in disability cases as though the employer will always carry the burden of proof. Thus, except when an employee engages in clearly actionable misconduct (such as in the Newberry case), employers should evaluate direct-threat cases carefully and determine whether they can, in fact, articulate a substantial and imminent risk of harm to the employee or others. The more this determination is based on medical or other objective evidence (as opposed to the assumptions of managers), the stronger the employer's position will be in removing or refusing to hire a disabled employee who poses a safety threat.

The cases discussed above are a good reminder that employers should always pay close attention to safety-sensitive positions and to those filling them. Safety-sensitive jobs can have an impact not only on safety in the workplace but also on customer and even public safety. If employees performing those jobs are not fully qualified to perform them properly, the employer's tort (and occasionally criminal) liability exposure, as well as the risk to its business reputation, may be very significant. Employers must weigh those considerations just as seriously as they evaluate their employment-law obligations in making employment decisions about safety-sensitive jobs.

The 9th Circuit's decision in *Echazabal*, which does not apply directly to Illinois employers, suggests that an employer violates the ADA by excluding an employee from a given position if the only safety risk the individual poses is to himself. It remains to be seen whether the 9th Circuit's position will be adopted by other federal appellate courts. In the meantime, in light of employers' obligations to maintain workplace safety for all employees under a host of state and federal laws and common law principles, Illinois employers are well advised not to assume the *Echazabal* decision represents a "bright line" rule.

The more prudent approach is to weigh objectively the competing considerations described above on a case-by-case basis and to determine whether the risk of harm to the individual or others, with or without reasonable accommodation, is substantial enough to outweigh the risk of removing or excluding a disabled worker from the job.

Finally, although the *Exxon* decision also does not have direct application to Illinois employers, it may give some comfort to the more limited class of employers whose business require them to impose general safety rules that have a tendency to exclude broader classes of disabled individuals from certain types of jobs. Exxon suggests that in the most highly safety-sensitive jobs (*e.g.*, airline pilots, police officers, firefighters, and nuclear-plant workers) the potential safety risks are so great that it becomes a business necessity to exclude certain classes of individuals from performing those jobs. This necessity may exist even if the employer is unable to prove that each individual in that class would pose a direct and substantial safety threat.

Even under the business-necessity analysis, of course, the employer must still show a significant connection between the types of disabled individuals excluded by the rule and a heightened threat to safety.

Whether the *Exxon* case will have application outside the 5th Circuit (and beyond these most dramatic public-safety situations) remains to be seen, but it does offer employers another possible line of defense to ADA claims where the application of employer safety rules is at stake.

Conclusion

These recent developments illustrate the complexity of employers' duties under the ADA. Illinois employers should note that although the statute is designed to protect disabled individuals from discriminatory employment practices, this noble goal was not meant to be achieved at the cost of workplace or public safety. Thus, when an employer is faced with a situation in which safety issues are implicated, it is wise to seek legal counsel.

EEO Update

EEOC Issues More Guidance on ADA

The EEOC has issued a new Enforcement Guidance, titled "Disability-Related Inquiries and Medical Examinations of Employees Under the ADA." The Guidance pertains to current employees. It contains the EEOC position on what employers can and cannot ask current employees, and when current employees can be required to undergo fitness-for-duty physicals or other job-related medical exams. Some highlights include treating employees who are seeking a new position within the company as applicants. Thus, an employer may require them to undergo post-offer tests or medical exams that would otherwise be unlawful with regard to current employees. The new Guidance also states that when an employee requests an accommodation, the employer cannot send the employee to a company physician unless the employee has provided insufficient documentation from the employee's treating physician to support the employee's request, and the employee has been given the opportunity to provide the missing information.

Perhaps the most expansive position taken by EEOC in its new Guidance is the view that ADA restrictions on pre-employment and employment inquiries and medical exams apply not only to qualified individuals with a disability, but also to nondisabled individuals. Under the EEOC view, a nondisabled applicant who is asked an illegal, disability-related question during an interview would have standing to sue under the ADA. Courts of Appeals for the 8th, 9th and 10th Circuits had already held this to be the law before EEOC issued its latest pronouncement. But at least two other circuits—the 5th and the 7th—had rejected this view of ADA coverage.

Seventh Circuit Rejects EEOC Position on Reassignment under the ADA

The 7th U.S. Circuit Court of Appeals has affirmed summary judgment for the employer, holding that the ADA does not require the reassignment of a disabled employee to a job where there is a more qualified nondisabled applicant for the position. In so ruling, the court rejected the position of the EEOC that the ADA's provision on reasonable accommodation by reassignment requires employers to give disabled individuals who are "at least minimally qualified to do the job" a preference over more qualified nondisabled persons, unless the employer can show undue hardship. Judge Richard A. Posner stated that requiring an employer to give the disabled individual the job even if another candidate would be twice as good at it "is affirmative action with a vengeance."

Reassignment Obligation under ADA May Include Overriding Seniority System

The full Court of Appeals for the 9th Circuit has reversed summary judgment for US Airways (formerly USAir), holding that a question of fact existed as to whether the company adequately participated in the interactive reasonable accommodation process with the plaintiff, and whether it should have reassigned the plaintiff to a mail room job as a reasonable accommodation. Agreeing with the EEOC and other circuit courts, the 9th Circuit Court held that a disabled worker can bypass a company seniority system in obtaining reassignment over a nondisabled worker, unless the employer can prove undue hardship. The court also held that reassignment is considered a reasonable accommodation, that the interactive process is mandatory, and that the interactive process need not be triggered by the employee.

Defamatory Statements on Electronic Bulletin Board May Constitute Harassment

The Supreme Court of New Jersey has ruled that postings on an electronic bulletin board may constitute workplace

harassment. The court held that a female pilot's hostile-work-environment claim against Continental Airlines—arising from alleged co-worker defamatory statements posted on an electronic bulletin board—may proceed before the trial court. During the litigation of plaintiff Blakey's sexual-harassment complaint, a number of Continental pilots posted derogatory and insulting remarks about Ms. Blakey on an online computer bulletin board. In reversing an earlier appellate court decision, the New Jersey Supreme Court recognized that harassment occurring outside of the workplace may be actionable. Though the court emphasized that employers do not have the duty to monitor private communications of their employees, employers do have the duty to take effective measures to stop co-employee harassment when they know-or have reason to know-it is part of a pattern of harassment taking place in the workplace or related settings. Thus, the state Supreme Court found that if an employer has notice that employees in a work-related forum such as CMF are engaged in a pattern of retaliatory harassment directed at a co-employee, the employer has a duty to remedy that harassment.

No Evidence of Age Bias for Applicant's "Lack of Aggressiveness"

The 11th U.S. Circuit Court of Appeals, in an en banc decision, has ruled that a 61-year-old man who was refused a job because he was not "aggressive," failed to state a claim of age discrimination. The court held that a "subjective reason is a legally sufficient, legitimate, nondiscriminatory reason if the [employer] articulates a clear and reasonably specific factual basis upon which it based its subjective opinion." As applied to the facts of the case, the court noted that the defendant decision-makers testified that, at the interview, the plaintiff was "not very concise in his answers," and "did not take a very aggressive approach" in asking questions. He also allegedly was "unclear" about why he had changed jobs frequently. In a 55-page dissent, Judge Stanley F. Birch Jr. said that the term "aggressive" is highly suspicious of age bias, as evidenced by "how often in the case law the words 'young' and 'aggressive' are linked together by defendant employers."

Job-Bias Testers Fall Short

The use of job-bias testers was dealt a major setback this fall when a federal jury in Chicago returned a verdict for the employer in the first testers case to proceed to trial, *Kyles v. J K Guardian Security Services*. In job-bias testing, a pair of applicants, one minority and one Caucasian, are given fictitious résumés—work histories and education. They are briefly trained to interview, ostensibly so they will react in the same fashion during interviews. The testers then apply for open positions at targeted employers. The treatment the minority tester received is compared to that which the Caucasian tester received. If the treatment was perceived as unequal, the minority tester filed EEOC charges and then a lawsuit. Whether job-bias testers had standing to sue was an open issue. (Testers don't want jobs, so how could they be injured if rejected?) In July 2000, the 7th Circuit concluded testers could sue.

In the *Guardian* case, the Legal Assistance Foundation of Chicago (LAFC) sent four testers, all of them Northwestern University students, to apply for a secretarial/receptionist position. The fictitious résumés of the minority job-bias testers said each had been paid $1 per hour more than their white counterparts. Both had also advanced to executive or administrative-assistant positions, and both had acquired additional skills—skills the employer did not seek. Guardian offered the position to both white testers, but did not offer it to the African-American testers.

In 1995, when this job-bias test occurred, Guardian Security employed approximately 280 workers, half of whom were minority members. And, of this half, 80 percent were African-American. Guardian had hired African-Americans and other minorities to be receptionists both before and after 1995. It had also hired African-Americans and other minorities for virtually every position within the company, including client contact and customer service.

After a three-day trial before a U.S. District Court Judge, the jury deliberated for less than 1½ hours before returning a defense verdict. Guardian Security was represented in this case by Seyfarth Shaw. Although Guardian was the first case to proceed to trial, employers should not expect the use of job-bias testers to abate. This summer, the LAFC received a grant of nearly $500,000 to spend over the next two years on further testing. Employers should carefully review their hiring practices and procedures to guard against tester lawsuits.

Douglas A. Darch (Chi.)

NLRB NEWS

NLRB Expands Union Representation of Contract/Temporary Employees

A divided National Labor Relations Board (NLRB) has opened the door for jointly employed "temporary" employees to be grouped with a company's regular employees for purposes of bargaining. Consolidating two cases, the NLRB has approved placing both temporary workers and regular employees in the same bargaining unit without first getting the permission of the employer and the temporary agency, if they qualify as joint employers. The board majority held that the sole determinant for evaluating the appropriateness of a combined temporary-regular employee bargaining unit should be the board's traditional "community of interests" analysis— *i.e.*, examining "a variety of factors to determine whether a mutuality of interests in wages, hours, and working conditions exists among the employees involved."

The majority pointed out that not every unit combining jointly and solely employed workers should be found appropriate under the community-of-interest test. Nevertheless, a group of employees, "working side by side at the same facility, under the same supervision, and under common working conditions, is likely to share a sufficient community of interest to constitute an appropriate unit." The board also observed that when there is a combined unit, both the user employer and the supplier employer are required to engage jointly in bargaining with the union, even though the user employer may not control many aspects of the employment relationship. In fact, the supplier employer typically has no relationship whatsoever with the user employer's regular workforce. The board stated that "employers will be obligated to bargain only over those terms and conditions over which they have control" and "we believe . . . that employers and unions will be able to formulate appropriate and workable solutions to logistical issues that may arise."

> "... nonunion employees, upon request, have the right to insist on representation by a co-employee in investigatory meetings that the employee reasonably believes may result in discipline."

Nonunion Employees Afforded Co-Employee Representation Rights

In another significant break from preexisting precedent, a divided NLRB has ruled that nonunion employees, upon request, have the right to insist on representation by a co-employee in investigatory meetings that the employee reasonably believes may result in discipline. See *Epilepsy Foundation of Northeast Ohio*, 331 NLRB No. 92 (July 10, 2000). The board majority, with Member Brame dissenting, held that nonunion employees thus were entitled to "Weingarten" representation, which is named after a Supreme Court case—*NLRB v. Weingarten*, 420 U.S. 251 (1975)—and holds that represented bargaining-unit employees are entitled to be accompanied by a union representative in similar types of investigatory interviews. Although we cannot discount the import of the board's new decision in *Epilepsy Foundation*, the ruling is subject to several important potential limitations:

- Representation is not required unless requested, and current case law does not require advising employees of their right to representation.

- Representation is required only with respect to meetings where the employee "reasonably" believes discipline may result. Under *Weingarten*, the right to representation does not exist in "run-of-the-mill shop-floor conversation" such as the "giving of instructions or training or needed corrections of work techniques."

- If an employee insists on co-employee representation, an employer may lawfully respond by deciding not to have the investigatory meeting—though in most cases employers are well-advised to have such a meeting, even with a co-employee present. There's always a possibility that imposing discipline without first obtaining the employee's version of events may: (1) affect a jury negatively in conventional employment litigation; and (2) give the employee an opportunity after the fact to invent additional explanations for his or her misconduct.

- If a co-employee is present, the employer has no obligation to "bargain" with the person and, again under *Weingarten*, may "insist that [it] is only interested . . . in hearing the employee's own account of the matter under investigation."

Election Day Raffles Impermissible

The NLRB, in a three-to-two decision, has adopted a *per se* rule prohibiting all election-day raffles, finding that the multifactor analysis it had long used was cumbersome and unpredictable. Five days before an election, Atlantic Limousine, Inc. distributed a flyer announcing an election-day raffle for a television/VCR unit worth approximately $350. The flyer stated that the prize was "approximately equal in value to what your union dues and initiation fees could be for the first year." The flyer also mentioned that the sole purpose of the raffle was to encourage everyone to vote and that participation in the raffle was voluntary. The union, after losing the election, filed an objection to the results, contending that the employer's election-day raffle constituted a grant of benefits that influenced the election and created an inappropriate, circus-like atmosphere. The new per se rule adopted by the majority prohibits both employers and unions from conducting a raffle if: (1) eligibility to participate in the raffle 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 the closing of the polls.

Lack of E-Mail Access Does Not Taint Election

The NLRB has determined that a union was not unlawfully denied access to the employer's e-mail system for purposes of spreading information about a decertification campaign. The board held that the employer's action of allegedly providing unequal access to the union did not interfere with the employees' choice and that the results of the decertification petition would stand. An employee who filed a decertification petition, and other employees, sent six mass e-mails supporting the decertification to almost all employees in the bargaining unit. The union protested the use of company e-mail to support the decertification campaign, and several weeks into the campaign, the union requested access to the employer's e-mail. The employer granted the union access to send no more than three e-mails and permitted the employee who filed the decertification petition to have the same access. The union sent only one e-mail. The board noted that the disparity in access to the e-mail system was caused to some extent by the union's choice to send only one e-mail and refused to hold the union's inaction against the employer. The board concluded that, under all the circumstances, the employer did not engage in conduct having a reasonable tendency to interfere with the employees' free choice.

IMMIGRATION ALERT

The American Competitiveness in the 21st Century Act

On October 17, 2000, President Clinton signed into law The American Competitiveness in the Twenty-First Century Act, favorably affecting the H-1B visa program, which enables employers to hire foreign workers for highly skilled positions in the United States for a temporary period. Additionally, the act sought to ease tensions in the sphere of permanent residency.

Generally, H-1B visas are available to foreign workers who possess a bachelor's degree in a professional field and will be working in a technical position requiring such a degree. The new law raises the annual number of available H-1B visas to 195,000 for FY 2001, 2002 and 2003 (from 115,000 in FY 2000; 107,500 in FY 2001; and 65,000 in FY 2003). Raising the cap is intended to obviate repetitive problems such as reaching the cap early on in a particular FY. Thus, for example, after only six months in FY 2000, the cap was reached, causing thousands of H-1B petitioners to queue up for the then upcoming FY 2001 as they awaited the availability of more visas or were required to leave the country.

Among the significant changes under the new law affecting employers seeking to engage foreign employees are the following:

Worker Mobility. Rather than wait for approval of a new H-1B petition as in the past, H-1B nonimmigrants can now change jobs immediately upon the filing of a (nonfrivolous) petition by a new employer so long as the individual is in lawful status at the time of filing and has not engaged in any unauthorized employment since his or her lawful admission.

Visa Cap Calculation Exceptions. Individuals employed at higher educational institutions and related or affiliated nonprofit entities, as well as individuals employed by nonprofit or governmental research organizations, are excluded from being counted towards the annual cap.

Fee Increases. Effective December 17, the H-1B educational training fee will increase to $1,000 from the previous $500 rate. This fee is charged in addition to the $110 INS filing fee and is intended for direction towards education and training programs for American workers seeking the skills necessary for these positions.

Per-Country Caps. Unused employment-based immigrant visas in a calendar quarter may now be allocated in subsequent quarters without regard to per-country limits. This increases the use of workers' visas in employer-preferred nations by permitting the diversion of visas from countries that fail to use their full allotment into countries that need more than their designated allotment.

Overdue Adjudications for Permanent Residency. In certain situations, H-1B visas may now be extended beyond the six-year limitation. Thus, rather than leaving the country if INS had not acted on an application at the time a visa expired, H-1B visa holders who have either an employment-based immigration petition or adjustment application on file—and pending for more than one year since either a labor certification or petition was filed—may extend their H-1B visa status in annual increments (regardless of our six-year cap) until the petition is denied or permanent residency is obtained.

With regard to I-485 (adjustment) cases in the employment-based categories that remain unadjudicated for at least 180 days, an applicant may change employers so long as the new job is in the same or similar classification without having to obtain approval of a new petition.

Fredric H. Fischer [Chi.]

SOUTHEAST REPORT

Recent Developments in the 11th Circuit

The 11th U.S. Circuit Court of Appeal's recent *en banc* decision in *Chapman v. AI Transport*, 229 F.3d 1012 (11th Cir. 2000), provides important guidance on common issues that surface with job-discrimination claims. In its decision, the 11th Circuit affirmed a lower court's grant of summary judgment to AI Transport, AIG Aviation, American International Group Claims Services (AIGCS), and American International Group (AIG)—collectively, "the Defendants"—on a claim based on circumstantial evidence brought up by a former employee under the Age Discrimination in Employment Act (ADEA). In its decision, the 11th Circuit clarified its position on an issue always at the center of the controversy in employment discrimination cases—the sufficiency of an employer's subjective reason for its adverse employment decision.

> "... subjective reasons are not the red-headed stepchildren of proffered nondiscriminatory explanations for employment decisions. Subjective reasons can be just as valid as objective reasons."

The Applicable Law. The familiar burden-shifting framework established in *McDonnell Douglas Corporation v. Green* and *Texas Department of Community Affairs v. Burdine* is used in ADEA claims that are based on circumstantial evidence. Under this framework, the plaintiff must first establish a *prima facie* case of discrimination. This can be accomplished by showing he or she: (1) was a member of the protected age group; (2) was subjected to adverse employment action; (3) was qualified to do the job; (4) was replaced by, or otherwise lost a position to, a younger individual.

If the employee makes out a *prima facie* case of discrimination, the employer must articulate a legitimate, nondiscriminatory reason for the challenged employment action. If the employer provides such a reason, the presumption of discrimination is eliminated. The employee then may present evidence that the employer's articulated reasons for the challenged employment action are pretextual. If the employee does not show sufficient evidence of pretext, summary judgment in favor of the employer should be granted.

The Facts. In 1992, AIGCS created new positions in its organization. John Chapman applied for the open position of Casualty Claims Manager at AIGCS and was interviewed by two vice presidents of AIGCS. AIGCS declined to offer Chapman the position and ultimately offered four other AI Transport employees the available jobs. Chapman brought claims against the Defendants under both the Americans with Disabilities Act (ADA) (the 11th Circuit affirmed a judgment entered on a jury verdict in favor of the Defendants on the ADA claim, the discussion of which is beyond this article's scope) and the ADEA, based on AIGCS's refusal to hire him.

Chapman established a *prima facie* case of age discrimination. He was 61 years old at the time he applied for the position at AIGCS. He was not hired for the position. He qualified for at least one of the positions for which he applied. The four applicants who received the jobs were younger. AIGCS then proffered two legitimate, nondiscriminatory reasons for not hiring Chapman. One of these reasons was subjective. AIGCS stated that one of the reasons Chapman was not hired was because of his poor performance in the job interview. For example, the interviewers described his answers to interview questions as "not concise" and "not very sharp."

Plaintiff's attempt to present sufficient evidence that AIGCS's articulated reason was pretextual, cited the "limited value of [the interviewers'] opinions about Mr. Chapman's appearance and demeanor" and that "this testimony is pretext for intentional discrimination."

The Holding. The 11th U.S. Circuit Court of Appeals found the proffered nondiscriminatory reason of Chapman's poor interview to be an "independently adequate bas[is]" for affirming the District Court's grant of summary judgment to Defendants. The 11th Circuit stated that "a subjective reason can constitute a legally sufficient, legitimate, nondiscriminatory reason under the *McDonnell Douglas/Burdine* analysis. Indeed, subjective evaluations for a job candidate are often critical to the decision-making process and, if anything, are becoming more so in our increasingly service-oriented economy." 229 F.3d at 1033. The court noted that subjective personal qualities such as attitude and enthusiasm can factor into employment decisions.

It is inconceivable that Congress intended antidiscrimination statutes to deprive an employer of the ability to rely on important criteria in its employment decisions merely because those criteria are only capable of subjective evaluation. To phrase it differently, subjective reasons are not

the red-headed stepchildren of proffered nondiscriminatory explanations for employment decisions. Subjective reasons can be just as valid as objective reasons. 229 F.3d at 1034.

Nonetheless, the court warned, defendants must articulate a reasonable, specific factual basis upon which they base their subjective decision. The court used the example of a sales clerk. The court noted that it might not be sufficient for an employer to state that it did not hire someone because of his or her appearance. However, if the employer stated that "he did not hire him because he had his nose pierced," the employer would have articulated a clear, specific nondiscriminatory reason for its adverse employment action. 229 F.3d at 1034.

In *Chapman*, the 11th Circuit found that the subjective reason offered by the Defendants was a "clear and reasonably specific explanation" of why Chapman was not hired. In addition, the court found that Chapman failed to present sufficient evidence that the reason was pretextual.

Theresa Yelton (Atl.)

BOSTON BULLETIN

Jury Awards White Male More than $400K in Massachusetts Federal Court Reverse-Discrimination Suit

Lawsuits alleging reverse discrimination are comparatively rare and difficult for a plaintiff to win. Still, a recent verdict in the U.S. District Court for the District of Massachusetts demonstrates that discrimination suits brought by nonminorities can be successful and create substantial exposure for employers. In *Joubert v. Summers, et al*., a jury returned a verdict in favor of a white-male plaintiff in a suit against his former employer, the U.S. Internal Revenue Service. In his suit, Joubert alleged that the IRS had discriminated against him based on his race and gender by denying him a promotion that was instead granted to an African-American woman, who had significantly less experience.

After seven days of trial, the jury returned a verdict in favor of Joubert, awarding him $26,000 dollars in lost wages and $397,187 in emotional-distress damages. The emotional-distress award was reduced to $300,000, pursuant to the section of Title VII that limits compensatory and punitive damages. In addition to damages, Judge Edward F. Harrington ordered the IRS to pay almost $240,000 in attorneys' fees and costs to the plaintiff.

This case serves as a graphic reminder that employers should be careful in making employment decisions—concerning both minority and nonminority employees—by maintaining regular and truthful performance evaluations, documenting all disciplinary actions and accurately explaining to employees the company's reason for any adverse employment action.

Richard L. Alfred (Bos.)

Massachusetts High Court Set to Consider Continuing Violation Rule

In a recent summary judgment decision, the Massachusetts Superior Court applied federal case law to hold that a plaintiff could not maintain a cause of action for a serial continuing violation under the Massachusetts Fair Employment Practices Act (MFEPA), Chapter 151B, because she had been aware that she was being discriminated against when the earlier acts, now untimely, took place. *Cuddyer v. The Stop & Shop Supermarket Company*, C.A. No. 97-01816, 2000 WL 343783 (Mass. Sup., March 8, 2000) (Fabricant, J.). The court further held that the alleged acts—which occurred within the six-month limitation period—could not support a finding of sexual harassment so "severe or pervasive" as to alter the conditions of employment. The case has been appealed directly to the Supreme Judicial Court and could serve to clarify an unsettled area of the law.

Since February, 1973, plaintiff Grace Cuddyer was employed by Stop & Shop in the manufacturing division. The plaintiff claimed that during the entire term of her employment, spanning more than 24 years, she endured sexual harassment by various co-workers. In granting summary judgment in favor of the employer, the court found that only two incidents fell within the six-month statute of limitations under Chapter 151B. The first incident occurred on September 7, 1994, when a foreman simulated masturbation while standing behind the plaintiff. The plaintiff complained about the incident, and the company promptly addressed the complaint. The second incident occurred in September 1997, after the plaintiff had filed a Massachusetts Commission Against Discrimination (MCAD) complaint, when a co-worker drew a sketch and then showed it to another worker. The plaintiff saw the drawing and perceived it as depicting her body. She complained about the incident, and, once again, the company promptly intervened.

Stop & Shop moved for summary judgment, claiming that all but one of the incidents were time-barred. The plaintiff countered by relying on the doctrine of continuing violation, contending that she experienced a sexually hostile environment over the entire period of her employment, such that each incident should be considered as part of an overall pattern of harassment.

The Superior Court rejected plaintiff's continuing-violation claim. In so doing, it relied primarily on federal law interpreting the continuing-violation standard in Massachusetts. These decisions hold that a plaintiff must show not only that some actionable conduct occurred within the limitations period, but that the timely incident bears a "substantial relationship" to the earlier ones, such that the "timely act form[s] part of and expos[es] a pattern." *Provencher v. CVS Pharmacy*, 145 F.3d 5, 14 (1st Cir. 1998); see also, S*abree v. United Broth. of Carpenters and Joiners*, 921 F.2d 396, 401 (1st Cir. 1990). A plaintiff cannot meet this requirement if he or she "was or should have been aware that he was being unlawfully discriminated against while the earlier acts, now untimely, were taking place." *Provencher* at 14.

Ms. Cuddyer testified at her deposition that she perceived the alleged conduct in each incident prior to September 7, 1994, as sexual harassment—either at the time it occurred or soon after—but, in each case, delayed filing her MCAD complaint by more than six months. Accordingly, the court held that all but the two alleged events described above were time-barred.

As to the remaining question of whether these two alleged incidents were sufficient to support the plaintiff's claim of sexual harassment, the Superior Court found that it was undisputed that neither incident involved "any physical contact, any request for sexual favors, any vulgar or demeaning language, or any threat or intimidation." The court also found that two events, three years apart, were not pervasive enough—even in the context of past alleged events-to create a hostile working environment.

> "... two events three years apart were not pervasive enough in the context of the past alleged events, to create a hostile working environment."

At least one Massachusetts Superior Court judge and the MCAD take a different approach to claims of continuing violation, ignoring whether a plaintiff knew or should have known that co-workers' past conduct was unlawful. See, for example, *De Almeida v. Children's Museum*, C.A. No. 99-0901 2000 WL 96497 (Mass. Sup. Ct., January 11, 2000) (Gants, J.). Cuddyer is consistent with the mainstream of federal cases. It is for the SJC to decide whether Massachusetts joins those courts or takes a far more liberal approach. No decision is expected until 2001.

Ariel Cudkowicz (Bos.)

U.S. Judge Sends Issue of Corrective Measures under Massachusetts Law to SJC

On June 2, 2000, in the wake of a trilogy of cases the U.S. Supreme Court decided last year (*Sutton v. United Airlines*, *Murphy v. UPS*, and *Albertson's v. Kirkingburg*), U.S. District Court Judge Woodlock certified to the Massachusetts Supreme Judicial Court (SJC) an important question regarding the scope of the Massachusetts state disabilities law in *Dahill v. Boston Police Dept*: Does the Massachusetts disability-discrimination law, G.L. ch. 151B, §4(16), require that courts consider corrective measures in determining whether an individual is "handicapped" under the statute?

As most employers know, a plaintiff suing under the federal Americans with Disabilities Act, has the burden of proving that he or she has an impairment that substantially limits one or more major life activities. Under the *Sutton* trilogy, the determination of whether a plaintiff is substantially limited under the ADA must be made after considering the effects of any corrective measure used by, or available to, the plaintiff. This ruling significantly restricts the number of individuals who may be considered "disabled" under federal law—and may therefore sue their employer for disability discrimination.

Although the *Sutton* trilogy resolved this issue under the ADA, the issue remains undecided under the Massachusetts antidiscrimination statute but is squarely presented in *Dahill*. In that case, the plaintiff had applied for a job as a police officer with the Boston Police Department. Having met the department's hearing requirements with the use of hearing aids, he was admitted to the Boston Police Academy. Dahill's performance at the academy raised concerns about his ability to carry out the duties of a policeman. After further medical evaluation, the department decided to terminate him because of concerns that his hearing impairment would prevent him from effectively and safely performing the job of a police officer.

Dahill filed suit in federal court against the department, alleging violations of state and federal disability-discrimination laws. The defendant, in its motion for summary judgment, argued that Dahill was not disabled under federal law because hearing aids substantially corrected his hearing impairment. The department argued that the court should apply the *Sutton*-trilogy ruling to Dahill's Massachusetts handicap-discrimination claim—and dis-

miss his claim—because hearing aids kept him from being significantly limited in the major life activity of hearing.

In certifying the Massachusetts law issue to the SJC, Judge Woodlock recognized that, although Massachusetts has generally applied federal precedent to its antidiscrimination laws, the court might adopt a less-restrictive standard on the corrective-measures issue by defining the term "handicapped" under Chapter 151B without regard to the use or availability of corrective devices. The Massachusetts Commission Against Discrimination takes just such a position in its recently published Handicap Discrimination Guidelines, which provides that "the existence of an impairment is generally determined without regard to whether its effect can be mitigated by measures such as medication, auxiliary aids or prosthetic devices."

The SJC is not expected to decide this issue until 2001. If the court interprets Massachusetts law so as to reject the *Sutton*-trilogy ruling, then an anomolous situation will exist for Massachusetts employers. An employee who is not substantially limited in a major life activity as a result of a corrective measure would not be considered "disabled" under federal law and, consequently, not entitled to a reasonable accommodation or damages for discrimination. However, that same employee could have substantially greater rights under Massachusetts law, depending on whether he or she met the other requirements of the law (including whether his or her impairment substantially limited a major life activity without the corrective measure). This legal disparity is particularly confusing and difficult for employers that operate in both Massachusetts and other jurisdictions.

We will report on the SJC's decision in *Dahill-and* how that decision affects Massachusetts employers-once the court issues its ruling.

Richard Alfred (Bos.)
Lynn Kappelman (Bos.)

ON CAPITOL HILL

Political Washington: What's Wrong with This Picture?

Mid-December in normal presidential election years usually finds the presidential-transition process in full swing, as the victor finalizes Cabinet selections for congressional confirmation and makes final decisions about the administration's agenda for the crucial one hundred days following Inauguration Day. Congress reorganizes itself, reapportions its committees, and begins the critical process of confirming both Cabinet and subcabinet appointees.

But things must work differently in the new millennium. As we write this, the only thing that can safely be said about "normalcy" in Washington, D.C., is that there is none. The 2002 congressional elections are more than 600 days away—yet already being discussed among the political cognoscenti. But most other things politically important are fuzzy, to say the least. Congress faces a lame-duck session where it must first address several appropriations for FY 2001. Will the lame-duck Congress finalize appropriation levels for next year-or extend a continuing resolution until the new Congress is sworn in? Given the recent presidential photo finish, many House and Senate members believe that a lame-duck session should go quietly into the night and let the 107th Congress deal with spending levels next year.

Before the election, it seemed that a lame-duck session might provide an opportunity to address several substantive employment-law-related legislative proposals. Likely candidates included a minimum-wage increase, private-pension protection, and a delay in adopting OSHA's newly promulgated ergonomics rule. If not addressed during the lame-duck session, these issues are likely to be front and center during the new Congress's opening days.

At the moment, it's not easy to predict the tone, tactics and timetable for the incoming Congress. The apparent 50-50 split in the Senate and the razor-thin Republican-held margin in the House make the reorganization of the two chambers very difficult. Questions about committee budgets, staff, chairmanships, and Republican-Democrat ratios are still up in the air—and the extent of the difficulty in forging an acceptable bipartisan agreement will be a good predictor of how smoothly the new session of Congress is likely to proceed.

The fact that everything about the election was dead-even does not, in itself, auger bitterness and deadlock on Capitol Hill. Pundits say that the outcome of the election was simply a measure of how little was at stake in a boring time of peace and prosperity. Prescription drugs and tax cuts are not issues on a par with slavery and civil rights. Observers rightly point out that the American electorate really isn't interested in hot-button, boat-rocking issues ("butterfly" ballots and "dimpled" chad excepted). Times are good, and wrenching policy changes may not be warranted.

Because public expectations are low—and falling daily—they should be easy to meet or exceed. The new president will benefit from a fiscal environment that supports well-defined, limited, bipartisan tax-and-spending proposals. Education and health care are areas where we can likely anticipate legislative success.

The next two years are certain to be challenging for everyone involved in day-to-day political decision-making. Just how challenging remains to be seen.

Donald L. Rosenthal (D.C.)

SOUTHWEST ROUNDUP

As an employer, you are besieged by complaints about a particular employee's less-than-sophisticated attire. Fearing the employee's appearance will affect the company's image, you make the difficult decision to replace him. Unbeknownst to you, the employee has just turned 40 and files an age-discrimination claim against your company. You are asked by your attorney to identify your reasons for terminating the individual's employment. Uncomfortable with stating your true motivations, you hastily criticize the employee's job performance. The employee is later able to make a showing that his work product was topnotch, and your articulated reason for termination is, therefore, false. Have you made a detrimental mistake? Perhaps.

Temporary Panacea for the Employer

In order to survive summary judgment in a discrimination case, the U.S. Supreme Court in *McDonnell Douglas* requires that a plaintiff must first create a presumption of discrimination by showing that (1) the plaintiff suffered an adverse employment action; (2) the plaintiff was qualified for the position; and (3) a person who differs in regard to a named characteristic (race, sex, age, disability) received preferential treatment that the plaintiff did not. If the plaintiff meets this burden, the employer must then rebut the presumption by articulating a legitimate, nondiscriminatory reason for the adverse employment action. The burden then shifts to the plaintiff to establish that the employer's articulated reason is pretextual. Once the plaintiff reaches the stage of proving pretext, however, there is some confusion in the Fifth Circuit as to exactly how much the plaintiff is required to prove in order to avoid summary judgment.

Before the recent U.S. Supreme Court decision in *Reeves v. Sanderson Plumbing Products, Inc.*, the 5th Circuit had held that an employee could avoid summary judgment if he or she offered evidence that could prove the employer's articulated reason was false—and that the protected characteristic was the true motivating reason behind the employee's termination. But the Supreme Court reversed the 5th Circuit, holding that a plaintiff need not always introduce additional evidence of discriminatory intent after the plaintiff shows that the employer's reason for its action is false. 120 S.Ct. 2097 (2000).

Even when faced with a conflicting Supreme Court decision, the 5th Circuit Court held that its prior precedent is consistent with Reeves. In both *Vadie v. Mississippi State University*, 218 F.3d 365, 373 n.23 (5th Cir. 2000) and *Rubenstein v. Administrators of the Tulane Educational Fund*, 218 F.3d 392, 400 (5th Cir. 2000), the 5th Circuit noted how the *Reeves* plaintiff presented evidence in his *prima facie* case that would go toward establishing the protected class as the defendant's motivation for terminating him. Therefore, he didn't feel a need to reprise such evidence at the pretext stage. Thus, the 5th Circuit still maintains that—in order to avoid summary judgment—a plaintiff who fails to offer convincing evidence that the protected class motivated the employer's decision in the *prima facie* case, must offer such evidence in conjunction with establishing that a defendant's proffered reason for termination is false.

However, the 5th Circuit's reading of *Reeves* may not be consistent with the Supreme Court's intent. The Supreme Court stated in *Reeves* that "once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation…" Statements such as this indicate that a plaintiff need not produce evidence of discriminatory comments or actions against the protected class—either in the *prima facie* case or during the pretext stage of analysis—in order to survive summary judgment.

Comments

- The 5th Circuit's holdings in *Vadie* and *Rubenstein* are positive indications for employers seeking summary judgment in the 5th U.S. Circuit Court of Appeals. The court is adopting a stricter standard for plaintiffs that requires them to produce some evidence of discriminatory comments or actions, rather than permitting them to avoid summary judgment merely by offering evidence that negates an employer's articulated reason for its actions.

- It is, nevertheless, unclear whether the 5th Circuit is correct in surmising that the Supreme Court's decision in *Reeves* is based solely on the distinction that the plaintiff had offered evidence of discrimination in his prima facie case.

- Given the unsettled nature of the pretext requirement, in situations such as the one in the above hypothetical, the employer should attempt to be as accurate as possible in providing the reasons for its actions to avoid a later showing that the articulated reason is a false reason. If the 5th Circuit is incorrect in its analysis of *Reeves*, then a finding that the employer's reason is a false one could cost an employer summary judgment.