

SELECTED LABOR AND EMPLOYMENT LAW UPDATES

compiled by Updates Editor

This section of the *Journal* provides notes on recent cases, pending or newly-enacted legislation, and other current legal materials. The Updates section is designed to aid the practitioner in relating the Symposium topic and *Journal* articles to the daily practice of labor and employment law. The *Journal* welcomes outside submissions of brief judicial and legislative summaries.

RETHINKING LAW IN THE TWENTY-FIRST CENTURY WORKPLACE

American Bar Association releases survey on cases brought under the Americans with Disabilities Act ("ADA"). In June, the ABA announced survey results showing that the vast majority of employment discrimination rulings under the ADA are decided in favor of employers. The findings were released at a three-day conference entitled "In Pursuit . . . a Blueprint for Disability Law and Policy," held in Washington, D.C.

The survey reviewed 1,200 Title I ADA cases. Of the cases where one party prevailed, 92.1% of the cases were decided in favor of the employer. The ABA further reported that analysis of discrimination charges resolved administratively by the EEOC revealed the same trend. These results suggest conflict with the prevailing notion of the ADA as civil rights legislation that favors plaintiffs and creates undue hardship for employers.

Professor Peter Blanck, who directs the Law, Health Policy and Disability Center at the University of Iowa, was named official reporter for the conference. He will work in conjunction with the ABA Commission on Mental and Physical Disability Law to prepare a report on the conference proceedings for publication in 1999.

Circuit split recognized on disabled individuals as protected class. *Moore v. Parks*, No. 96-56650, 1998 U.S. App. LEXIS 5469 (9th Cir. Mar. 17, 1998). The U.S. Court of Appeals for the Ninth Circuit has recently

recognized, but did not address, a split in the circuits over whether individuals with disabilities constitute a class under 42 U.S.C. § 1985, which creates a cause of action with regard to conspiracies to deprive individuals of their civil rights. While the Second and Eighth Circuits have held that disabled individuals are covered as a class under § 1985, the Courts of Appeals for the Seventh and Tenth Circuits have found that persons with disabilities do not constitute a class. *See Moore*, 1998 U.S. App. LEXIS 5469, at *11 n.3, *citing* *W.B. v. Matula*, 67 F.3d 484, 503 n.15 (3d Cir. 1995).

In *Moore*, the court determined that the plaintiff did not suggest at the trial court level that the defendants had conspired against her on the basis of her disability or produce evidence to that effect. The plaintiff was thus barred from introducing such a claim on appeal.

SEC revision of shareholder proposal rule to include employment-related social issues. Shareholder Proposals, 17 C.F.R. Part 240.14a-8 (1998). In May, the SEC announced the revision of § 240.14a-8 to reverse its 1992 *Cracker Barrel* no-action letter, which permitted companies to exclude automatically from proxy statements all proposals dealing with employment-related issues. *See Cracker Barrel Old Country Store, Inc.*, SEC No-Action Letter, 1992 WL 289095 (SEC) (Oct. 13, 1992). In that letter, the Commission announced that a shareholder proposal concerning a company's employment policies for the general workforce is properly governed by the employment-based "ordinary business" nature of the proposal. The letter stated that the fact that such a proposal was tied to a social issue would no longer be construed to remove the proposal from the realm of "ordinary business" under Rule 14a-8(c)(7) of the Securities Exchange Act of 1934. In *Cracker Barrel*, the Commission allowed a company to exclude a shareholder proposal that the board expressly prohibit discrimination on the basis of sexual orientation. The 1992 decision thus prevented pension funds and other employee-oriented shareholder groups from placing social issue proposals in proxy materials.

The New York City Employees' Retirement System, the proponent of the *Cracker Barrel* proposal, sued the SEC but the Second Circuit upheld the SEC's decision. *See New York City Employees' Retirement Sys. v. SEC*, 45 F.3d 7 (2d Cir. 1994). Since that ruling, the SEC has continued to allow companies to omit employment-related shareholder proposals from proxy materials. These amendments to the rule mean that omission will no longer occur automatically.

The new rule provides that all employment-related shareholder proposals raising social policy issues may be excluded from the realm of "ordinary business." Proposals relating to "ordinary business" subject matters such as employment, but focusing on sufficiently significant social

policy issues (e.g., discrimination), would transcend the day-to-day business matters and raise policy issues appropriate for a shareholder vote. The Commission will return to the case-by-case approach that preceded the *Cracker Barrel* no-action letter.

Application of new Supreme Court guidelines for sexual harassment cases. Reinhold v. Commonwealth of Virginia, 151 F.3d 172 (4th Cir. 1998). The U.S. Court of Appeals for the Fourth Circuit recently reconsidered a previous sexual harassment decision in light of new Supreme Court guidelines.

The plaintiff, employed as a school psychologist for the Virginia School for the Deaf and Blind, alleged that she was subject to unwelcome sexual advances that constituted sexual harassment on the part of her supervisor. At the trial court level, the jury returned a verdict in favor of the plaintiff on both her quid pro quo and hostile work environment claims, and the district court entered judgment in favor of the plaintiff. The Fourth Circuit then affirmed the district court's finding that the plaintiff had proven all the elements of a quid pro quo claim, holding that extra work, inappropriate assignments, and denying the opportunity to attend a professional conference constituted sufficient tangible job detriment to state a quid pro quo claim.

Upon reconsideration under *Burlington Indus. v. Ellerth*, 118 S. Ct. 2257 (1998), and *Faragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998), the Fourth Circuit found that the plaintiff no longer proved the tangible job detriment necessary to state a claim of quid pro quo sexual harassment. The new test articulated by the Supreme Court defines a "tangible employment action" to be a "significant change" such as hiring, firing, failure to promote, or reassignment. See *Ellerth*, 118 S. Ct. at 2268. Plaintiff's evidence failed to meet this new standard and the appellate court rejected her claim of quid pro quo sexual harassment. The court vacated the district court's judgment and remanded the plaintiff's additional hostile environment claim in light of new defenses under *Ellerth* and *Faragher*.

Reinhold was one of the first cases to be reconsidered in light of the *Ellerth* and *Faragher* decisions. Since *Ellerth* and *Faragher*, the Supreme Court has vacated and remanded at least five cases to be decided under the new sexual harassment standards.

Sexual harassment standard of employer liability applied in racial harassment case. Booker v. Budget Rent-A-Car Systems, No. 3:94-0048, 1998 U.S. Dist. LEXIS 12962 (M.D. Tenn. July 13, 1998). A U.S. District Court for the Middle District of Tennessee applied elements of the newly-articulated standards for sexual harassment claims to a claim of racial harassment. Rejecting the employer's motion for summary judgment, the

court found that plaintiff had produced sufficient evidence to support allegations that his supervisor engaged in racial harassment. The court further found that the company could not prove it had exercised reasonable care to prevent racial harassment, a holding that paralleled the Supreme Court's establishment of an effective policy as an affirmative defense to sexual harassment claims.

The plaintiff, a black employee of the defendant corporation, had risen steadily through the management ranks since his hiring in 1979. In 1992, he received a promotion that required him to report directly to a supervisor who subsequently engaged in numerous incidents of racial harassment. In response to the plaintiff's complaints, the EEOC issued a determination finding that the plaintiff had been harassed and denied a promotion because of his race. The plaintiff subsequently filed suit, alleging racial harassment and racial discrimination.

The district court granted in part and denied in part the defendants' motion for summary judgment. In analyzing the plaintiff's racial harassment claims under Title VII and 42 U.S.C. § 1981, the district court found that the Supreme Court's recent decisions in *Faragher* and *Ellerth* "clarified the standards to be used by courts in determining the extent to which employers are liable for the harassment perpetrated by supervisory personnel." *Booker*, 1998 U.S. Dist. LEXIS 12962, at *30.