

Selected Labor & Employment Law Updates

compiled by Book Review/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 *Journal* articles to the daily practice of labor and employment law. The *Journal* welcomes outside submissions of brief judicial and legislative summaries.

Supreme Court holds that a "prima facie case and sufficient evidence of pretext may permit trier of fact to find unlawful discrimination, without additional, independent evidence of discrimination, though such showing will not always be adequate to sustain jury's finding of liability" under the ADEA. Reeves v. Sanderson Plumbing Products Inc., 120 S. Ct. 2097 (2000).

Petitioner Reeves, 57, was a supervisor in one of respondent's departments. His responsibilities included supervising employees and their hours of work. In 1995, Powe Chesnut, the company's director of manufacturing, was informed that the department's production was down because employees were often absent, late, or leaving early. Because the monthly attendance reports did not indicate a problem, Chesnut ordered an audit, which, according to his testimony, revealed numerous timekeeping errors and misrepresentations by Reeves, among others. Chesnut and other company officials recommended to the company president, Sandra Sanderson, that the responsible employees, including Reeves, be fired, to which she complied.

Reeves filed this suit, claiming termination because of his age in violation of the Age Discrimination in Employment Act of 1967 (ADEA). At trial, respondent contended Reeves had been fired due to his failure to maintain accurate attendance records. Reeves attempted to demonstrate that this explanation was pretext for age discrimination, introducing evidence that he had accurately recorded the attendance and hours of the employees he supervised, and that Chesnut had demonstrated age-based animus in his dealings with him. The case went to the jury, which returned

a verdict for Reeves. The Fifth Circuit reversed. Although recognizing that Reeves may well have offered sufficient evidence for the jury to have found that respondent's explanation was pretextual, the court explained that this did not mean that Reeves had presented sufficient evidence to show that he had been fired because of his age. In finding the evidence insufficient, the court weighed the additional evidence of discrimination introduced by Reeves against other circumstances surrounding his discharge, including that Chesnut's age-based comments were not made in the direct context of Reeves' termination; there was no allegation that the other individuals who recommended his firing were motivated by age; two of those officials were over 50; all three supervisors were accused of inaccurate recordkeeping; and several of respondent's managers were over 50 when Reeves was fired.

The Supreme Court then held that a "(1) prima facie case and sufficient evidence of pretext may permit trier of fact to find unlawful discrimination, without additional, independent evidence of discrimination, though such showing will not always be adequate to sustain jury's finding of liability . . . (2) in entertaining motion for judgment as matter of law, court should review all evidence in the record . . . and (3) there was sufficient evidence for jury to find that employer had intentionally discriminated, thus supporting verdict for employee under ADEA."

Court holds that the record demonstrates that a former employee's grievance alleged only harassment based on sexual orientation, and sexual orientation is not proscribed by Title VII and the former employee failed to show that he reasonably believed he had made adequate complaints about sexual harassment. Hamner v. St. Vincent Hospital and Health Care Center, Inc., No. 99-3086, 2000 WL 1202287, 2000 U.S. App. LEXIS 21421 (7th Cir. Aug. 24, 2000).

The U.S. Court of Appeals for the Seventh Circuit held that a male nursing employee could not allege termination in retaliation for submitting a sexual harassment grievance. Title VII does not cover Gary Hamner, who sued St. Vincent Hospital, his former employer, for retaliatory termination.

The Court affirmed a magistrate judge's decision regarding Title VII where the plaintiff had argued that he was harassed because of his sexual orientation (not because of his sex). The defendant moved that the plaintiff had failed to present sufficient evidence for a reasonable jury to find that he opposed an unlawful employment practice under Title VII. The magistrate judge concluded that Hamner failed to establish the first element of his retaliation case because he failed to show that he opposed an unlawful employment practice under Title VII.

The Court states that same-sex sexual harassment is actionable under

Title VII where it occurs due to the plaintiff's sex. However, the phrase in Title VII prohibiting discrimination based on sex means that it is unlawful to discriminate against women because they are women and against men because they are men. In other words, Congress intended the term "sex" to mean "biological male or biological female," and not one's sexuality or sexual orientation. Therefore, harassment based solely upon a person's sexual preference or orientation (and not on one's sex) is not an unlawful employment practice under Title VII.

According to a recent decision by the National Labor Relations Board, non-union employers must now permit employees to have a coworker present during questioning regarding certain workplace incidents. Epilepsy Foundation of Northeast Ohio, 331 NLRB No. 92, 164 L.R.R.M. 1233, (July 10, 2000).

In a case that may have far reaching consequences, the NLRB has determined that even non-union employers must allow employees to allow a coworker to be present during questioning regarding some workplace incidents. Interestingly, many non-union employers do not know the National Labor Relations Act even covers non-union employees. Moreover, this new employer obligation comes directly from Section 7 of that Act. Employer workplace investigations might now face a largely-unknown statutory violation. We have undoubtedly not seen the end of this case, as it represents a major and sudden rule change.

The Supreme Court has granted certiorari to decide whether or not the Federal Arbitration Act covers employment contracts. Circuit City Stores v. Adams, 194 F.3d 1070 (9th Cir. 1999), cert granted, 120 S.Ct. 2004, (2000).

Adams sued the employer in state court claiming a violation of the California anti-discrimination statute. The employer then sued in federal court seeking a stay of the state court action and seeking an order to compel arbitration. The federal trial compelled arbitration; the 9th Circuit reversed; the Supreme Court has now granted certiorari.

Adams signed a job application that included an agreement to submit all claims and disputes to arbitration. An employee cannot work for the employer without signing the arbitration agreement. The 9th Circuit previously held that the Federal Arbitration Act (FAA) does not apply to labor or employment contracts. Even though the arbitration agreement in this case provided that it did not form a contract of employment, the Court of Appeals held that the arbitration agreement signed by employee at time of job application was an "employment contract," and thus the FAA was

inapplicable.