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.

Court holds that warehouse employees who were not guaranteed fixed hours or schedules and could bid for regular jobs as they became available were not "casual employees" as defined by the collective bargaining agreement (CBA), and the employer thus was required to contribute to fund on their behalf. Even if the employer treated the employees as casual employees, such practice could not contravene the express terms of the CBA and the fund was not estopped from claiming that the employer owed contributions. Central States, Southeast, Southwest Areas Pension Fund v. Kroger Co., 226 F.3d 903 (7th Cir. Sept. 15, 2000).

In an action where a pension fund sued an employer under ERISA Section 515 to recover delinquent pension contributions, the trial court interpreted the collective bargaining agreement's terms. The trial court's determination that "part time" employees were "regular" employees (not "casual" employees) was affirmed on appeal.

Court holds that evidence that an employer would have terminated an employee even in absence of unlawful retaliation based on the disruptive manner in which he pursued his discrimination complaints was sufficient for submission to jury. Matima v. Celli, 228 F.3d. 68 (2d Cir. Sept. 18, 2000).

Under Title VII, Section 706 - (g)(2)(B), a finding that an employer in a mixed-motive case "would have taken the same action in the absence of the impermissible motivating factor," limits the form of relief that a trial court can order. Employees in such cases are not precluded from collecting

attorney fees and costs or from receiving certain declaratory and injunctive relief. The principal issue on appeal was whether this section applies to Title VII mixed motive cases that are based on retaliation.

All other circuits that have considered the issue have concluded that the section does not apply to mixed motive retaliation cases. This court, in adopting the approach of the other circuits, held that proof by an employer that it would have "taken the same action in the absence of the impermissible motivating factor" acts as a complete bar to relief in Title VII mixed motive retaliation cases.

Court holds that technicians who were on-call during all their off-premises time, were entitled to compensation for on-call time. Also, time spent in personal pursuits would not be subtracted from an award of overtime compensation. The district court did not abuse its discretion in awarding prejudgment interest for the entire period of recovery and did not abuse its discretion in refusing to award liquidated damages. Finally, there was no clear error in finding that the company's FLSA violation was not willful, thus limiting damages award to the statute's two-year limitations period. Pabst v. Oklahoma Gas & Elec. Co., 228 F.3d 1128 (10th Cir. Sept. 20, 2000).

The issue for the court was to decide "when 'on-call' time becomes sufficiently onerous to render it compensable under the Fair Labor Standards Act (FLSA)." In addition to their regular shifts, Pabst and other employees monitored many systems in several of the employer's buildings on an on-call basis. They typically responded to between three and five alarms each night, and their supervisor allegedly instructed them to report only that on-call time which was spent actually responding to alarms, even though they had to stay near home during that time.

The FLSA doesn't explicitly address the issue of on-call time. Under *Armour & Co. v. Wantock*, 323 U.S. 126 (1944), and *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), the relevant inquiry is either whether an employee is "engaged to wait" or "waiting to be engaged" or alternatively whether on-call time is spent predominantly for the benefit of the employer or the employee. Courts in the Tenth Circuit also focus on the degree to which the burden on the employee interferes with his or her personal pursuits. In light of the relevant circumstances, the court found that Pabst's on-call time was compensable overtime.

Court holds en banc that the interactive process under the ABA is a mandatory rather than permissive obligation on the part of employers, and is triggered by giving notice of the employee's disability and desire for accommodation. They also held that the seniority system is not a per se

bar to reassignment being a reasonable accommodation and the employee in this case failed to establish retaliation in that he did not rebut the employer's reason for putting him on job-injury leave. Barnett v. U.S. Air, 228 F.3d 1105 (9th Cir. Oct. 4, 2000).

Barnett alleged that his employer violated the ADA by denying him accommodation, failing to engage in the interactive process, and retaliating against him for filing charges with the Equal Employment Opportunity Commission (EEOC).

Many new issues were raised in this case. First, the ADA's definition of "qualified individual with a disability" includes individuals who could perform the essential functions of a reassignment position, with or without reasonable accommodation, even if they can't perform the essential functions of their current position.

Second, the court joined "the vast majority of our sister circuits" in holding that the interactive process is a mandatory rather than a permissive obligation on the part of employers under the ADA. This obligation is triggered when an employee (or his representative) gives notice of his disability and the desire for accommodation.

In circumstances where an employee is unable to request an accommodation, and the employer knows of the employee's disability, the employer must assist in initiating the interactive process. If an employer fails to engage in good faith in the interactive process, and a reasonable accommodation would have been possible, then the employer is liable under the ADA. Furthermore, an employer can't prevail at the summary judgment stage if there is a genuine dispute as to whether the employer engaged in good faith in the interactive process.

Third, the court observed that "[t]he question of whether an employer's unilaterally imposed seniority system trumps a disabled employee's right to reassignment [under the ADA] has not been answered directly by any other circuit." The court held that "reassignment is a reasonable accommodation and . . . a seniority system is not a per se bar to reassignment. However, a seniority system is a factor in the undue hardship analysis. A case-by-case fact intensive analysis is required to determine whether any particular reassignment would constitute an undue hardship to the employer. If there is no undue hardship, a disabled employee who seeks reassignment as a reasonable accommodation, if otherwise qualified for a position, should receive the position rather than merely have an opportunity to compete with non-disabled employees."

Finally, most other circuits have adopted the Title VII framework for analyzing ADA retaliation claims. The court joined those circuits, holding that "[t]o establish a prima facie case of retaliation under the ADA, a plaintiff must show (1) that he or she engaged in or was engaging in

activity protected by the ADA, (2) the employer subjected him or her to an adverse employment decision, and (3) that there was a causal link between the protected activity and the employer's action."

Court holds that an employee's problems resulted from his altercations with co-workers over work issues, and because of his apparent homosexuality, not because of his sex, thus defeating the hostile work environment claim. The employee could not maintain a Title VII retaliation claim absent any adverse employment action and the employee failed to establish a sex discrimination claim premised on the employer's alleged differential response to harassment complaints. Spearman v. Ford Motor Co. 2000 WL 164628 (7th Cir. Nov. 3, 2000)

Spearman sued his employer alleging sexual harassment in violation of Title VII. Spearman was a homosexual male who was allegedly subjected to various discriminatory statements made by male co-workers at the factory where they worked. These comments, targeting at his homosexuality and perceived lack of masculinity, included sexually explicit insults and graffiti. Spearman argued that the statements were motivated by "sex-stereotypes" because his co-workers perceived him to be too feminine to fit the male image of a factory worker.

Same-sex sexual harassment is actionable under Title VII to the degree it occurs "because of" sex. This means that it is unlawful under Title VII to discriminate against women because they are women and against men because they are men. Sexual harassment based solely upon a person's sexual orientation is not an unlawful employment practice under Title VII.

The court noted that "according to Oncale and Price Waterhouse, we must consider any sexually explicit language or stereotypical statements within the context of all of the evidence of harassment in the case, and then determine whether the evidence as a whole creates a reasonable inference that the plaintiff was discriminated against because of his sex." Applying this standard, the court found that the statements complained of by Spearman were motivated by either his homosexuality or work-related disputes, not "because of" Spearman's sex. Therefore, the trial court was correct in granting summary judgment for the employer.

Court held that: (1) society was not a "state actor" amenable to suit under § 1983, and (2) age-based discrimination was not the determinative factor in termination decision, and society thus was not liable under ADEA even if its reasons for termination were pretextual. Schnabel v. Abramson, 2000 WL 1676601 (2d Cir. Nov. 8, 2000).

The Second Circuit held that "Legal Aid" is not considered a state actor amenable to suit under 42 U.S.C. § 1983. The court also held that in the wake of *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S. Ct. 2097 (2000), a trial court may grant summary judgment in favor of an employer on an Age Discrimination in Employment Act (ADEA). The trial court may do so where an employee has established his prima facie case and presented evidence of pretext.

Reeves prevents courts from imposing a per se rule requiring ADEA plaintiffs to offer more than a prima facie case and evidence of pretext. However, the court stated "we decline to hold that no ADEA defendant may succeed on a summary judgment motion so long as the plaintiff has established a prima facie case and presented evidence of pretext. Rather, we hold that the Supreme Court's decision in *Reeves* clearly mandates a case-by-case approach, with a court examining the entire record to determine whether the plaintiff could satisfy his 'ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff.'"

Court holds that the continuing violation doctrine applied to permit the introduction of evidence of pre-limitations period conduct in an action against a railroad for racial discrimination and retaliation under Title VII. Morgan v. National Railroad Passenger Corp., 2000 WL 1672651 (9th Cir. Nov. 8, 2000).

The issue on appeal centered on application of the "continuing violation" doctrine to Morgan's Title VII claims of race discrimination, hostile environment, and retaliation. The court has never adopted a strict notice requirement as the litmus test for application of the continuing violation doctrine.

Under *Fiedler v. UAL Corp.*, 218 F.3d 973 (9th Cir. 2000), a continuing violation can be established by showing either a serial violation or a systemic violation. In either type of violation, at least some part of the violation must have occurred within the limitations period. Applying this to Morgan's claims, the court concluded that continuing violations had been sufficiently established to preclude summary judgment.