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 Merit Systems Protection Board can consider prior discipline that is still pending in a grievance process. United States Postal Service v. Gregory, 532 U.S. 1143 (2001).

The Postal Service discharged Gregory for alleged misconduct. Gregory appealed to the Merit Systems Protection Board. The Board denied the appeal, finding that the discharge was reasonable in light of the fact that three prior disciplinary actions, which the Board determined were not clearly erroneous, were still being contested under a collective bargaining agreement

The Federal Circuit reversed the Merit Systems Protection Board, holding that the Board could not consider prior disciplinary actions that were still subject to ongoing proceedings.

The Supreme Court unanimously vacated the Federal Circuit's decision, holding that the Merit Systems Protection Board has authority to make an independent review of disciplinary actions that are pending in grievance proceedings. The Supreme Court held further that the Federal Circuit may only review decisions of the Merit Systems Protection Board under a narrow "arbitrary and capricious" standard.

National Labor Relations Board General Counsel issues Guideline Memorandum GC 02-01 concerning Levitz. Levitz Furniture Co. of the Pac., 333 N.L.R.B. 105 (Mar. 29, 2001).

The National Labor Relations Board overruled *Celanese Corp* and reversed fifty years of NLRB precedent with Memorandum GC 02-01. 95

N.L.R.B. 664 (July 27, 1951). Prior to this decision an employer could withdraw union recognition based on a good faith doubt as to the union's majority. The Guideline Memorandum provides guidance on how Regions should investigate these cases. It also discusses the procedure for processing RM petitions and what evidence is required to satisfy the NLRB good-faith reasonable uncertainty standard.

Sixth Circuit holds that employer's anti-nepotism rule passes constitutional muster and that a public employee cannot be required to "fully agree" with employer's policy. Vaughn v. Lawrenceburg Power Sys., 2001 U.S. App. LEXIS 22508 (6th Cir. Oct. 19, 2001).

A married couple brought suit claiming the public employer's anti-nepotism rule and the resulting discharge of the husband violated the U.S. Constitution. The employer's policy was to employ only one member of a family, and to require termination of the husband if two employees got married. In *Vaughn*, the employer discharged the husband. The discharge was proximately caused by the husband's failure to "fully agree" with the employer's policy.

Examining the policy under a rational basis test, because the policy did not bar the Vaughns from marrying, the Sixth Circuit found that the policy was rational as a means to promote workplace discipline and was not in violation of the U.S. Constitution.

The circuit court affirmed the trial court's grant of summary judgment for the employer stating, "[w]e hesitate to approve a rule that allows a government official to interrogate individuals about their mental adherence to government policies."

The Third Circuit holds that an unconsenting successor employer is not required to arbitrate. AmeriSteel v. Teamsters Local 430, 276 F.3d 264 (3d Cir. 2001).

AmeriSteel bought a manufacturing facility from Brocker Rebar. The purchase agreement stated that AmeriSteel would not be bound by the collective bargaining agreement between Brocker and the union. Before closing of the purchase agreement, the union filed a grievance and intitiated arbitration proceedings challenging the unilateral changes in working conditions that would take place as a result of the purchase agreement. Ameristeel sued to enjoin the arbitration proceedings.

The trial court issued an injunction, and the Third Circuit affirmed. Citing *N.L.R.B. v. Burns Int'l Sec. Svcs.*, the Third Circuit held that an unconsenting successor employer cannot be bound by the substantive terms of a CBA negotiated by its predecessors. 406 U.S. 272 (1972). Thus,

arbitration would serve no purpose because there was no binding contract for an arbitrator to interpret, and any resulting award could not be upheld by a court.

Eleventh Circuit holds that employer's disability plan providing decreased benefits to mentally disabled employees may be a violation of the Americans with Disabilities Act. Johnson v. Kmart Corp., 2000 U.S. Dist. LEXIS 7587 (S.D. Ala. May 23, 2000).

Johnson received long-term disability benefits for his mental disability from his former employer. The benefits plan provided mentally disabled employees salary replacement for a maximum of two years, while employees disabled due to physical illness were eligible to receive salary replacement until age sixty-five. Johnson sued Kmart alleging disability discrimination.

In considering whether a former employee is covered under the ADA's anti-discrimination provision, the court cited *Robinson v. Shell Oil Co.*, where the Supreme Court held that former employees are protected under the "opposition clause" of Title VII's anti-retaliation provision. 519 U.S. 337 (1997). In keeping with this decision, the Eleventh Circuit held that former employees are covered by the ADA.

The Eleventh Circuit held further that compliance with the ADA requires more than impartial treatment of the disabled as compared with the non-disabled. The court held that Kmart's plan distinguished among beneficiaries on a discriminatory basis under Title I of the ADA.

Supreme Court dismisses writ of certiorari in Adarand Constructors v. Mineta, 2001 U.S. LEXIS 10814 (Nov. 27, 2001)

The Supreme Court originally granted certiorari in Adarand to decide whether strict scrutiny is the appropriate standard to be applied in determining whether Congress had a compelling interest to enact legislation designed to remedy the effects of racial discrimination; and whether the U.S. Department of Transportation's current Disadvantaged Business Enterprise program is narrowly tailored to serve a compelling governmental interest.

The Supreme Court dismissed the writ of certiorari as improvidently granted.

The Tenth Circuit holds that seniority rights may be modified in railroad consolidations. Swonger v. Surface Transp. Bd., 265 F.3d 1135 (10th Cir. 2001).

The Tenth Circuit held that seniority rights are not privileges, rights, or benefits that must be preserved under *N.Y. Dock Ry. v. United States*, 609 F.2d 83 (2d Cir. 1979). The court also stated that, in most railroad consolidations, seniority rights must be modified in some manner. However, a showing of necessity is still required for modification of seniority rights in a consolidation, acquisition, or merger. This necessity standard does not require a finding that the merger could not be effectuated without the proposed change.