

# 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 considerations of public policy, as reflected by Omnibus Transportation Employee Testing Act of 1991 and Department of Transportation (DOT) implementing regulations, did not preclude enforcement of arbitration award ordering employer to reinstate truck driver who had twice tested positive for marijuana. Eastern Associated Coal Corp v. United Mine Workers of America, 121 S. Ct. 462 (2000).*

The arbitration provisions in Eastern Associated Coal Corporation's collective-bargaining agreement (CBA) with the Union specify that Eastern must prove in binding arbitration that it has "just cause" to discharge an employee, or else the arbitrator will order the employee reinstated. James Smith worked for Eastern as a truck driver subject to Department of Transportation (DOT) regulations requiring random drug testing of workers engaged in "safety-sensitive" tasks. After each of two occasions on which Smith tested positive for marijuana, Eastern sought to discharge him. Each time, the Union went to arbitration, and the arbitrator concluded that the drug use did not amount to "just cause" and ordered Smith's reinstatement on certain conditions.

On the second occasion, Eastern filed suit to vacate the arbitrator's award. The federal district court ordered the award's enforcement, holding that Smith's conditional reinstatement did not violate the strong regulation-based public policy against drug use by workers who perform safety-sensitive functions. The 4th Circuit affirmed.

The Court assumed that the CBA itself calls for Smith's reinstatement, as the parties have granted the arbitrator authority to interpret the meaning of their contract's language, including such words as "just cause," and

Eastern did not claim that the arbitrator acted outside the scope of his contractually delegated authority. Since the award is not distinguishable from the contractual agreement, the Court had to decide whether a contractual reinstatement requirement would fall within the legal exception that makes unenforceable a CBA that is contrary to public policy. Any such policy must be “explicit,” “well defined,” and “dominant,” and it must be “ascertained by reference to the laws and legal precedents, not from general considerations of supposed public interests.” The question is not whether Smith’s drug use itself violates public policy, but whether the agreement to reinstate him does so.

A contractual agreement to reinstate Smith with specified conditions does not run contrary to public policy. The public policy exception is narrow and must satisfy the principles set forth in those cases. Moreover, where two political branches have created a detailed regulatory regime in a specific field, courts should approach with particular caution pleas to divine further public policy in that area. Eastern asserted that a public policy against reinstatement of workers who use drugs could be discerned from an examination of the Omnibus Transportation Employee Testing Act of 1991 and DOT’s implementing regulations.

However, these expressions of positive law embody not just policies against drug use by employees in safety-sensitive transportation positions and in favor of drug testing, but also include a Testing Act policy favoring rehabilitation of employees who use drugs. The award here is not contrary to these several policies, taken together, as it does not condone Smith’s conduct or ignore the risk to public safety that drug use by truck drivers may pose, but punishes Smith by placing conditions on his reinstatement. It violates no specific provision of any law or regulation, but is consistent with DOT rules requiring completion of substance-abuse treatment before returning to work and with the Act’s driving license suspension requirements and its rehabilitative concerns.

Moreover, the fact that Smith is a recidivist is not sufficient to tip the balance in Eastern’s favor. Eastern’s argument that DOT’s withdrawal of a proposed “recidivist” rule leaves open the possibility that discharge is the appropriate penalty for repeat offenders failed because DOT based the withdrawal, not upon a determination that a more severe penalty was needed, but upon a determination to leave in place other remedies. The Court could not find in the Act, the regulations, or any other law or legal precedent an explicit, well defined, dominant public policy to which the arbitrator’s decision runs contrary.

In a concurring opinion, Justices Scalia and Thomas joined in the Court’s judgment, but criticized the majority for agreeing with the principle that “courts’ authority to invoke the public policy exception is not limited solely to instances where the arbitration award itself violates positive law.”

In the opinion of these two Justices, “it is hard to imagine how an arbitration award could violate a public policy . . . without actually conflicting with positive law. If such an award could ever exist, it would surely be so rare that the benefit of preserving the courts’ ability to deal with it is far outweighed by the confusion and uncertainty, and hence the obstructive litigation, that the Court’s Delphic ‘agree[ment] in principle’ will engender.”

*Supreme Court holds that and order compelling arbitration and dismissing a party’s underlying claims is a “final decision with respect to an arbitration” within meaning of Federal Arbitration Act (FAA), and thus is immediately appealable. This abrogated Seacoast Motors of Salisbury, Inc. v. Chrysler Corp., 143 F.3d 626 (1st Cir. 1998), Altman Nursing, Inc. v. Clay Capital Corp., 84 F.3d 769 (5th Cir. 1996), Napleton v. General Motors Corp., 138 F.3d 1209 (7th Cir. 1998), Gammara v. Thorp Consumer Discount Co., 15 F.3d 93 (8th Cir. 1994), and McCarthy v. Providential Corp., 122 F.3d 1242 (9th Cir. 1997). The Court also holds that an arbitration agreement that does not mention arbitration costs and fees is not per se unenforceable on theory that it fails to affirmatively protect a party from potentially steep arbitration costs. Green Tree Fin. Corp.-Alabama v. Randolph, 121 S. Ct. 513 (2000).*

Randolph sued claiming violations of the Truth in Lending Act (TILA) and Equal Credit Opportunity Act. The trial court granted Green Tree’s motion to compel arbitration, and dismissed all claims with prejudice. The 11th Circuit held that the trial court’s order to arbitrate was an appealable “final order” and reversed the order to arbitrate. The US Supreme Court held that the order was final and appealable, and that the arbitration agreement was enforceable.

Randolph’s mobile home financing agreement with Green Tree contained an arbitration clause that was silent as to arbitration costs. When Randolph sued, Green tree insisted that the matter be arbitrated.

A unanimous Court decided that when a trial court orders the parties to arbitrate, and dismisses all the claims before it, the decision is a “final order” under federal Arbitration Act Section 16(a)(3), and therefore is appealable. There is no exception for “embedded” proceedings in which there is both an arbitration request and claims for other relief. However, a the Court split 5-4 in deciding that the arbitration agreement is enforceable even though it says nothing about arbitration costs.

In the dissent, the issue on enforceability of the arbitration agreement should be remanded for clarification of the facts as to the accessibility of the arbitral forum to Randolph. Editor’s Comment: In many circuit courts there had built up a distinction between “embedded” proceedings and

“independent” proceedings. In those circuits, an arbitration order in an independent proceeding was final and appealable, but an arbitration order in an embedded proceeding was not final and not appealable. That distinction is now abolished, and all such orders are final. The 1st, 5th, 7th, 8th, and 9th Circuits now have to change their approach.

Editors Note: On remand, the trial court held, and the 11th Circuit affirmed, that contractual provision to arbitrate TILA claims is enforceable even if it precludes plaintiff from utilizing class action procedures in vindicating statutory rights under TILA.

*Supreme Court holds that states are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions towards such individuals are rational. The Court also holds that the legislative record of the ADA fails to show that Congress identified a pattern of irrational state discrimination in employment against the disabled. Thus, there was no support for an abrogation of the states' Eleventh Amendment immunity from suits for money damages under Title I of the ADA. Therefore, the Eleventh Amendment bars state employees' federal court ADA suits.*

*Congress' § 5 enforcement authority under the Fourteenth Amendment is appropriately exercised only in response to state transgressions, and not constitutional violations by units of local governments. In any event, the rights and remedies created by the ADA against the states raise concerns as to congruence and proportionality, supporting determination that Congress did not validly abrogate the states' immunity. University of Alabama v. Garrett, 121 S. Ct. 955 (2001).*

State employees sued the University of Alabama seeking money damages under Title I (employment discrimination) of the Americans With Disabilities Act (ADA). The Supreme Court ultimately upheld, by a 5-4 vote, the trial court's grant of summary judgment for the University.

Suits in federal court by state employees to recover money damages by reason of the states' failure to comply with Title I of the ADA are barred by the Eleventh Amendment. Congress may abrogate states' Eleventh Amendment immunity when it both unequivocally intends to do so and acts pursuant to a valid grant of constitutional authority. Only the second requirement was at issue in this case. Congress cannot abrogate states' immunity by using Article I powers (e.g., the commerce power), but can use Section 5 of the Fourteenth Amendment. To the extent Congress reaches beyond the scope of the protections of Section 1 of the Fourteenth Amendment, it must exhibit “congruence” and “proportionality” between the injury to be prevented or remedied and the means adopted to that end.

The Court had previously held that the states' treatment of disabled individuals is subject only to minimum "rational basis" review. Thus, the Fourteenth Amendment itself does not require states to make special accommodations for the disabled. The legislative history of the ADA fails to show that Congress identified a history and pattern of irrational employment discrimination by the states. Although there were half a dozen relevant examples in the record, these do not suggest a pattern of unconstitutional discrimination on which Section 5 legislation must be based.

The rights and remedies created by the ADA do not show the necessary congruence and proportionality. For example, the ADA requires employers to make their facilities readily accessible to disabled individuals unless to do so would impose an undue hardship. That requirement far exceeds what the constitution requires. By contrast, the Court upheld the Voting Rights Act of 1965 because Congress had documented a marked pattern of unconstitutional action by the states and had determined that litigation was an ineffective remedy.

*Supreme Court holds that held that only employment contracts of transportation workers were exempted from the Federal Arbitration Act (FAA), not all employment contracts as thought by the Ninth Circuit, abrogating Craft v. Campbell Soup Co., 177 F.3d 1083 (9th Cir. 1998). Circuit City Stores, Inc. v. Adams, No. 99-1379, 2001 WL 273205, 2001 U.S. Lexis 2459 (Mar. 21, 2001)*

A provision in Adams's application for work at Circuit City required all employment disputes to be settled by arbitration. After he was hired, Adams filed a state-law employment discrimination action against Circuit City, which then sued in federal court to enjoin the state-court action and to compel arbitration pursuant to the FAA. The District Court entered the requested order. The Ninth Circuit reversed, interpreting Section 1 of the FAA - which excludes from that Act's coverage "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" - to exempt all employment contracts from the FAA's reach. The Supreme Court reversed, holding that the Section 1 exemption is confined to transportation workers. Therefore, Adams's agreement to arbitrate is covered by the FAA.

The FAA's coverage provision, Section 2, compels judicial enforcement of arbitration agreements "in any . . . contract evidencing a transaction involving commerce." The "involving commerce" phrase implements Congress' intent to exercise its commerce power to the full.

The statutory text forecloses the construction that Section 1 excludes all employment contracts from the FAA. Unlike Section 2's "involving

commerce” language, the Section 1 words “any other class of workers engaged in . . . commerce” constitute a residual phrase, following, in the same sentence, explicit reference to “seamen” and “railroad employees.” The residual clause should be read to give effect to the terms “seamen” and “railroad employees,” and should be controlled and defined by reference to those terms.

The Court was not persuaded by the assertion that its Section 1 interpretation should be guided by the fact that, when Congress adopted the FAA, the phrase “engaged in commerce” came close to expressing the outer limits of its Commerce Clause power as then understood. This fact alone does not provide any basis to adopt, “by judicial decision, rather than amendatory legislation,” an expansive construction of the FAA’s exclusion provision that goes beyond the meaning of the words Congress used.

As the Court’s conclusion was directed by Section 1’s text, the rather sparse legislative history of the exclusion provision was not assessed. The Court brushed aside the argument that, under the Court’s reading, the FAA in effect pre-empts state employment laws restricting the use of arbitration agreements.

*Supreme Court holds that Washington statute providing for automatic revocation, upon divorce, of any designation of spouse as beneficiary of nonprobate asset was preempted, as it applied to ERISA benefit plans. The state law “related to” ERISA plans, which directly conflicted with ERISA requirement that plans be administered, and benefits be paid, in accordance with plan documents. Therefore, ERISA preempts the state probate statute. Egelhoff v. Egelhoff, No. 99-1529, 2001 WL 273198, 2001 U.S. Lexis 2458 (March, 21 2001).*

Washington Revised Statute 11.07.010 provides that upon dissolution of marriage a beneficiary designation in favor of a former spouse is revoked. The United States Supreme Court reversed the Washington Supreme Court’s holding that ERISA didn’t preempt the statute, and that the statute applied to ERISA plans. ERISA’s preemption section provides that ERISA “shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan” covered by ERISA. The Court has held that a state law “relates to” an ERISA plan “if it has connection with or reference to such a plan.”

Based on that test, the court held that the Washington probate statute has an impermissible connection with ERISA plans. More specifically, the court held that the statute fails the “connection with” prong of the test because 1) the statute “governs the payment of benefits, a central matter of plan administration;” and 2) the statute “interferes with nationally uniform plan administration.”

*Court holds that an arbitration clause in appellee Laboratory Corporation of America's ERISA-governed health benefits plan is enforceable. Court also holds that appellant should have received leave to amend his complaint to state a claim against the administrator of the plan for breach of fiduciary duty in failing adequately to notify Chappel of the existence and terms of the arbitration clause. Chappel v. Laboratory Corporation of America, 232 F.3d 719 (9th Cir. 2000).*

An ERISA fiduciary has a duty to “discharge its duties with respect to a plan solely in the interest of the participants and beneficiaries.” This duty applies when an ERISA fiduciary writes and implements an arbitration clause. The court noted that although existing ERISA regulations do not specifically address arbitration, they provide guidance for a fiduciary seeking to create reasonable” arbitration procedures. The court concluded stating that a fiduciary should also “give written notice of steps to be taken to obtain external review through mandatory arbitration when it denies an internal appeal.”

*Court holds that the failure of officers to form a “blue wall of silence,” after claimant was discovered in a state vehicle, was not violation of claimant's equal protection rights. The Court also holds that the claim that the investigation and subsequent imposition of punishment was retaliatory was precluded by determination that same result would have been reached if claimant had not cooperated with internal affairs investigation. Finally, the court holds that the officers did not engage in any actionable harassment. Diesel v. Town of Lewisboro, 232 F.3d 92 (2d Cir. 2000).*

Diesel sued under 42 USC Section 1983, claiming he was subjected to “selective enforcement” of the law in violation of his federal equal protection rights. The court observed that selective enforcement claims present “a ‘murky corner’ of equal protection law in which there are surprisingly few cases.” In order to prevail on such a claim, an employee must show that compared with others similarly situated, he was selectively treated and such selective treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure.

Diesel basically claimed that he was entitled to the benefits of the “blue wall of silence,” behind which police officers allegedly cover up occasional misconduct on the part of other officers. The court held that “a selective enforcement claim under the Equal Protection Clause of the Fourteenth Amendment cannot rest on the allegation that police officers

refused to close their eyes to another officer's serious misconduct in accordance with the tradition of the "blue wall of silence."

*Court holds that the minimum contacts test for personal jurisdiction inapposite under ERISA Section 1132(e)(2) and that the California statute wasn't preempted by ERISA. Medical Mutual of Ohio v. deSoto, 234 F.3d 298 (6th Cir. 2000).*

DeSoto was a participant in a group insurance plan that was a "welfare benefit plan" governed by the Employee Retirement Income Security Act (ERISA). The plan sued deSoto for reimbursement after deSoto settled a suit against a hospital for damages arising from inadequate care. Two primary issues on appeal were 1) whether the trial court had personal jurisdiction over deSoto, and 2) whether California Civil Code section 3333.1 was preempted by ERISA.

Section 1132(e)(2) of ERISA confers "nationwide" personal jurisdiction. Normally, when determining the existence of personal jurisdiction, the "minimum contacts" test set out by *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) applies. The personal jurisdiction requirement restricts judicial power as a matter of individual liberty - an individual's due process right not to be subject to extra-territorial jurisdiction unless he has a sufficient relationship with the state asserting jurisdiction. When a federal court sitting pursuant to federal question jurisdiction exercises personal jurisdiction over a United States citizen based on a congressionally authorized nationwide service of process provision, that individual liberty interest is not threatened. In such a case, a federal court exercises jurisdiction for the territory of the United States, and the individual liberty concern is whether the individual has sufficient minimum contacts with the United States. Thus, a "national contacts" analysis is applicable and under that test, assertion of personal jurisdiction over deSoto was proper.

California Civil Code § 3333.1 allows a health care provider being sued for professional negligence to introduce evidence that the plaintiff obtained collateral benefits from its insurance company. The Code prohibits the source of those collateral benefits, the insurance company, from recovering the benefits it provided the plaintiff or subrogating the plaintiff's right to recover. The court held that § 3333.1 is not preempted by ERISA basing its decision on its finding that the benefit plan was an insured plan, and not a self-funded plan.

*Court holds that an employer cannot unilaterally implement policy after declaring impasse on that issue, inasmuch as parties had reached only piecemeal, not overall, impasse during the collective bargaining*

*process. Duffy Tool & Stamping L.L.C. v. NLRB*, 233 F.3d 995 (7th Cir. 2000).

The issue on appeal was whether an employer could make unilateral changes in the terms and conditions of its workers' employment when the parties reach a deadlock on an issue during negotiation. Here, a "no fault" attendance policy proposed by the employer was less lenient than the one that presently existed was at issue. Because the union opposed the policy during negotiations on a new collective bargaining agreement, the employer declared an impasse and then unilaterally implemented the new policy.

The union argued that unilateral implementation of the new policy was unlawful, since the parties had not yet reached an overall impasse in the negotiations. Otherwise, by deadlocking on a particular issue an employer is free to implement his proposal regarding that issue.

The court noted further that allowing employers to declare impasse on a single issue would make eventual overall agreement less likely by removing issues from the bargaining agenda. The court reasoned that both parties would be more satisfied when there are a number of issues that have been resolved or compromised by both parties. In addition, the court observed that "there is really no such animal as a deadlock on a single issue in a multifaceted negotiation" anyway. Based on the considerations above, as well as the overall policy considerations underlying federal labor law, the court concluded that the NLRB was on "sound ground" in insisting that the employer bargain until the parties are deadlocked in the negotiations as a whole.

*Court affirms jury verdict of same-race racial harassment under Title VII. Ross v. Douglas County*, 234 F.3d 391 (8th Cir. 2000).

Ross sued his former employer alleging, among other things, hostile environment race discrimination in violation of Title VII. The trial court granted judgment in favor of Ross after a jury verdict in his favor; the Eighth Circuit affirmed.

Ross was a black male. The bulk of the allegedly hostile conduct at issue came from Ross's supervisor. The employer argued that, since the supervisor was a black male, he could not have had the racial animus required to support a hostile environment claim. The court rejected that argument on the basis of the United States Supreme Court's decision in *Oncale v. Sundowner Offshore Services, Inc.*, 523 US 75 (1998).

In *Oncale*, a male was subjected to humiliating sex-related conduct by other males at work. The Supreme Court held that "nothing in Title VII necessarily bars a claim of discrimination . . . merely because the plaintiff

and the defendant . . . are of the same sex.” The court concluded that “[g]iven the Oncale decision, we have no doubt that, as a matter of law, a black male could discriminate against another black male ‘because of such individual’s race.’”

*Court holds that a female employee with Chronic Fatigue Syndrome presented evidence of pretext sufficient to create a question of fact for the jury with respect to her failure-to-promote claim. Therefore, the employer’s reason for promoting a male could be a pretext. Durley v APAC, Inc, 236 F.3d 651 (11th Cir. 2000).*

Durley sued claiming sex discrimination, violation of the Americans With Disabilities Act (ADA), retaliation for filing an EEOC charge, and intentional infliction of emotional distress. The trial court granted summary judgment for the employer; the 11th Circuit reversed on the sex discrimination claim, and affirmed on all other claims.

After working for the employer for about ten years, Durley, a female who had served nine years as assistant purchasing agent, applied to be promoted to purchasing agent. The employer closed one of its workshops, consolidated two positions, and appointed a male instead of Durley. Durley filed an EEOC charge. At EEOC’s request, the employer prepared a job description for the new position. The job description emphasized warehouse and fabrication skills possessed by the male appointee rather than the administrative duties that were the main function of the job performed by the person who previously held the job.

The court reversed the summary judgment as to the sex discrimination claim. There was evidence that the employer’s stated reason for selecting the male were pretextual. The stated reason was that the employer consolidated the positions of purchasing agent and warehouse foreman, and appointed the male because he was more qualified. There was evidence that Durley was qualified, that the employer’s “post-hoc formulation of a job description . . . emphasized [the male’s] warehouse and fabrication skills,” that the male lacked administrative or purchasing experience, that Durley helped train the male appointee, and that the prior job-holder’s list of duties for a consolidated position included fabrication and simple welding as being only 1 percent of the duties. All of her other claims were rejected by the court.

*Court holds that an employee’s inability to engage in sexual intercourse more than twice per month as result of back injury did not substantially limit major life activities of sexual reproduction or engaging in sexual relations, for purposes of ADA. Even if he had been able to have intercourse 20 times per month prior to accident, absent any evidence as to*

*condition, manner or duration under which he could reproduce as compared to average person in general population, his claims could not be sustained.*

*Court also addresses the issue of working as a major life activity, finding an individual's impairment "substantially limits" major life activity of working if individual is significantly restricted in ability to perform class of jobs or broad range of jobs in various classes. Contreras v. Suncast, 237 F.3d 756 (7th Cir. 2001).*

Contreras sued his former employer alleging, among other things, failure to reasonably accommodate in violation of the Americans with Disabilities Act (ADA). The trial court granted summary judgment in favor of the employer; the 7th Circuit affirmed. Contreras contended that he was substantially limited in the major life activities of working and "reproduction/engaging in sexual relations."

With respect to the major life activity of working, Contreras claimed that he was unable to lift in excess of 45 pounds for a long period of time, unable to engage in strenuous work, and unable to drive a forklift for more than four hours a day. The court concluded that these limitations were not sufficient to constitute the required "substantial limitation" on Contreras's ability to work. The court noted that the 4th, 5th, and 8th Circuits, when faced with similar sets of facts, have found those limitations do not qualify as a substantial limitation on working.

With respect to the major life activity of "sexual reproduction and engaging in sexual relations," Contreras asserted that he was only able to have intercourse twice per month. He claimed that, prior to his purported disability, he had been able to engage in that activity twenty times per month (a claim which the court noted was "unsupported").

The United States Supreme Court acknowledged that sexual reproduction is a major life activity in *Bragdon v. Abbott*, 524 US 624 (1998). The court noted that "we recognize it may be argued that the Supreme Court may have implied that engaging in sexual relations is a major life activity." In *Bragdon*, the court concluded that an HIV infected woman was substantially limited in her ability to reproduce. The Supreme Court focused on the fact that an infected woman who attempts to reproduce imposes a significant risk to any male she has intercourse with (as well as her child).

The court distinguished this case from *Bragdon*. In contrast to *Bragdon*, Contreras had not shown any significant impact on his ability to reproduce. The court declined to decide whether engaging in sexual relations is a major life activity, but concluded that even if it were, Contreras had provided insufficient proof of a substantial limitation.

*Court holds that reports about police misconduct prepared while police officer worked as civilian employee for professional standards department were not speech entitled to First Amendment protection. Gonzalez v. City of Chicago, 239 F.3d 939 (7th Cir. 2001).*

Gonzalez worked for a police department investigating public complaints against officers. As the result of one of his reports, an officer was discharged. After the officer's discharge, and the subsequent issuance of additional reports regarding other officers, Gonzalez became the object of a considerable amount of hostility. After eventually being discharged, he sued the police department (and others) alleging he had suffered retaliation in violation of his free speech rights under the 1st Amendment.

Claims by public employees asserting violations of 1st Amendment free speech rights are analyzed under a two-step test. First, it must be determined whether the employee spoke "as a private citizen upon matters of public concern." If so, the interests of the employee (as a citizen in commenting upon matters of public concern) must be balanced against the interests of the state (as an employer in promoting the efficiency of the public services it performs through its employees).

In Gonzalez's case, the issue centered on the first step of this test. The court framed the primary issue on appeal as "whether a public employee receives 1st Amendment protection for producing writings that may address matters of public concern, but are also a routine requirement of the job." All of the speech at issue was mandated in Gonzalez's capacity as an investigator. Even though the content of the reports was a matter of public concern, generation of the reports themselves was a necessary part of his job. The few courts that have addressed such circumstances have held that the speech at issue was not protected under the 1st Amendment. The court agreed with those holdings. The court thus stopped short of establishing a per se rule exempting statements made in the course of official duties from 1st Amendment protection.

*Court holds that a genuine issue of material fact existed as to whether county's articulated nondiscriminatory reason for not hiring white applicant for one of training instructor positions during reorganization was pretextual. The court also holds that an issue of fact existed as to whether county acted pursuant to its affirmative action plans in not hiring white applicant. The affirmative action plan was direct evidence of discrimination. Bass v. Board of County Comm'rs, No. 99-10579, 2001 WL 169746, 2001 U.S. App. Lexis 2442 (11th Cir. Feb. 21, 2001).*

Bass, a "non-Hispanic white" employee, sued the employer claiming (among other things) race discrimination in violation of Title VII. He

claimed that the employer's failure to hire him for an alternative position, after his position was eliminated via a reduction-in-force, was impermissibly race based. The employer had in place an affirmative action plan. Normally, if an employer were found to have acted pursuant to an affirmative action plan, the next question would be whether the plan was valid under Title VII.

In Bass' case, though, the employer distanced itself from the affirmative action plan. It was Bass who relied on the plan as direct evidence of discrimination. The court held that in this situation, "the affirmative action plan constitutes direct evidence of discrimination if there is sufficient circumstantial evidence to permit a jury reasonably to conclude that the employer was acting pursuant to its plan in taking the employment action in question." The court noted that "a defendant who in fact acts pursuant to an affirmative action plan cannot avoid judicial review of the plan by disavowing reliance upon it, where there is evidence that the plan played a part in the employment decision."

Throughout the trial, the employer repeatedly denied that it had relied upon the plan. With respect to those denials, the court noted further that "in the event that the jury disbelieves the County's denials . . . the County is not entitled to retrench and argue that its affirmative action plans are valid and constitute a defense to race discrimination claims."