Selected Labor & Employment 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.

First Circuit holds that alcoholic was not "disabled" under the ADA. Bailey v. Georgia Pacific Corp, 306 F.3d 1162 (1st Cir. 2002).

Bailey was an alcoholic. While he was generally able to fulfill his employment responsibilities, he was sometimes unable to take extra shifts because he had been drinking. He had several convictions for driving while intoxicated and was ultimately sentenced to four months of incarceration. His employer denied his request to supervise him on a work release program, and after his vacation and sick leave had expired, he was terminated for not being available to work.

Bailey alleged a violation of the Americans with Disabilities Act (ADA). The trial court granted summary judgment for the employer and the First Circuit affirmed.

The Court applied a three-step analysis to conclude that Bailey was not disabled under the ADA. (1) There must be an impairment and alcoholism is such an impairment. (2) Bailey must identify a "major life activity," and he alleged that his alcoholism substantially limited the major life activity of "working." (3) The impairment must "substantially limit" the major life activity. This requires a "weighty showing" the he is "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities." The Court concluded that Bailey had presented evidence that his difficulties were only at one job, and were "isolated and, for the most part, not momentous." His incarceration was only short-term was also not a substantial limitation.

Third Circuit holds that a statement by supervisor that he was "looking for younger people" is direct evidence of age discrimination sufficient to shift the burden of persuasion to the employer, and allow a jury to find that the decision makers placed substantial negative reliance on the plaintiff's age in reaching their decision to fire him. Fakete v. Aetna, Inc., 308 F.3d 335 (3d Cir. 2002).

After a reorganization of the audit department, Fakete, a 56 year old audit consultant was told by his supervisor the company was "looking for younger single people that will work unlimited hours and that [he] wouldn't be happy there in the future." Fakete was issued a warning and then discharged five months later, just three months before his pension vested. The employer claimed the discharge was because he violated the terms of the warning, falsified expense reports and failed to pay for personal phone calls. Fakete alleged age discrimination. The United States District Court for the Eastern District of Pennsylvania granted summary judgment to the employer.

The Third Circuit analyzed the case a "direct evidence" case under *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). Under the *Price Waterhouse* standard, "direct evidence" that age was a substantial factor in an employment decision shifts the burden to the employer to prove that it would have discharged the plaintiff without consideration of age. The Court rejected the trial court's portrayal of the supervisor's statement as "a stray remark that did not directly reflect the decisionmaking process of any particular employment decision," reversed the summary judgment order and remanded the case.

Fifth Circuit holds that an unincorporated business wholly owned by the Choctaw nation, was exempt from Title VII's definition of "employer." Thomas v. Choctaw Management, 313 F.3d 910 (5th Cir. 2002).

Plaintiff husband and wife employees brought an action pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e et seq., 42 U.S.C.S. § 1981, and state law against defendant employer and supervisor alleging religion and pregnancy discrimination. The United States District Court for the Southern District of Texas dismissed the action and plaintiffs appealed the Title VII claims only.

Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e et seq., states unequivocally that the term "employer" does not include, an Indian tribe. 42 U.S.C.S. § 2000e(b). The Court rejected the argument that Choctaw Management is a legal entity separate from the tribe, finding that the employer "is not a corporation at all and is, in fact, a direct proprietary enterprise of the Choctaw Nation." 313 F. 3d at 910.

Fifth Circuit holds that Federal employee, who abandoned EEOC appeal after employer failed to take timely action on Title VII complaint, exhausted administrative remedies. Martinez v. Dept. of U.S. Army, No. 02-50765, 2003 U.S. App. LEXIS 942 (5th Cir. Jan. 22, 2003).

A federal employee sued his employer, Department of the United States Army alleging race and gender discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e et seq. The United States District Court For the Western District of Texas granted the employer's motion to dismiss for failure to exhaust administrative remedies. The employee appealed.

Albert C. Martinez (Martinez) filed a formal complaint for discrimination based on race and gender regarding his non-selection for promotion with the Department of the United States Army. Several months later Martinez filed a second formal complaint alleging harassment based on reprisal for filing his first complaint. The Army issued a report of its investigations into both of Martinez' complaints after the first complaint's 180-day deadline expired but before the second complaint's 180-day deadline expired. The Army did not otherwise enter a final decision. Martinez timely appealed to the Equal Employment Opportunity Commission (EEOC) for review. Before the administrative law judge heard the employee's appeal, he abandoned his administrative appeal and subsequently filed suit in federal court.

The Fifth Circuit held that for the purposes of the failure-to-exhaust inquiry, where a case languishes in the administrative phase beyond the 180 day deadline, the court cannot say that abandoning the administrative process constitutes such a lack of cooperation as to bar suit by reason of failure to exhaust administrative remedies.

D.C. Circuit holds that the National Labor Relations Board failed to provide sufficient reasoning to support its conclusion that contractor's employees had NLRA Section 7 rights to distribute handbills. New York New York v. NLRB, 313 F.3d 585 (D.C. Cir. 2002).

The owner, New York New York (NYNY) leased space in its casino complex to an independent contractor, Ark, who operated food service facilities. When some of the contractors' employees engaged in union organizing activity, the owner had the contractor's employees cited and removed as trespassers. The National Labor Relations Board (NLRB) found that the employer's actions violated Section (8)(a)(1) of the National Labor Relations Act (NLRA).

The Supreme Court has never addressed whether the employees of a