Employment and Labor Law Section Newsletter

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Instituting an Employment Law Course: or "They Will Come"

by

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Hawaii Pacific University

In January, we are offering our first undergraduate Employment Law course at Hawaii Pacific University. This article will relate some of our experiences in getting to this point and a remaining concern.

Hawaii Pacific University is a rapidly growing multi-campus university located on the island of Oahu, Hawaii. The student body is diverse with a large international constituency. The countries of Asia represent the largest segment of the international student body, but European countries compromise the most rapidly growing segment. The U.S. students fall in three major categories: Hawaii residents, mainland students and military students. There are over 7,000 students from all 50 states and over 60 countries now studying at the University.

The study of Human Resource Management has been an area of rapid growth in the past several years in the Business School. Currently the School offers a Master of Arts in Human Resource Management and a Bachelor of Science in Business with a Human Resource Management major. In addition to Human Resource majors, we expect that the Employment Law course will draw students from other areas of the University and we are hoping to draw a few managers from the downtown community.

As attorneys with an interest in Employment Law, we are well aware of the ever expanding legal encroachments into traditional areas of management discretion in employment issues. We are certainly not alone in that knowledge, almost every manager with a few years of experience has some horror story to relate and management professors in the classroom find it extremely difficult to try to keep abreast of all the legal parameters circumscribing the employment arena.

Given the above, we found it relatively easy to develop a strong constituency supporting the introduction of an Employment Law course into our curriculum. The supporters included the management faculty, the University's Human Resource Department and Business Advisory Council, representatives of the local Chamber of Commerce, and a local law firm recognized as being on the leading edge of employment issues. The latter two will be providing guest speakers and other support.

Our curriculum was already custom-designed for an expansion of this nature. We have a required introductory business law course that includes basic concepts of the legal system, torts, contracts, and commercial transactions. We had previously established specialized law courses tailored for accountants and travel industry management majors along with a generic advanced business law course. As we processed the change introducing the Employment Law course, we also added specialized advanced business law courses for computer and information systems majors and for international business majors. By the time we took the proposals to the Curriculum Committee and the Academic Senate, we had broad based support backing the changes to the law curriculum as changes that benefitted the entire business curriculum. Admittedly, there is less resistance to change and there are other advantages that come with being in a prospering growth institution.

Text selection created its own special problems. Early on, we reached an agreement with the Chamber of Commerce and the law firm of Torkildson Katz Jossem Fonseca Jaffe Moore and Heatherington to use their jointly produced Chamber Desk Manual, a guide to employment law in Hawaii, as an ancillary text for the course. But we could not find a general employment law text that delivered quite what we wanted. Although we respected the authors and their work, most of the texts were more focused on labor law and more traditional issues than we wanted. Consequently, we started working on developing a text using the McGraw Hill computerized Primis system. Then, at the ALSB conference in Colorado Springs this August, we discovered that Dawn Bennett-Alexander and Laura Pincus have a new Employment Law text coming out in 1994 for Irwin Publishing Co., which better serves our needs. It is entitled Employment Law for Managers.

Now the task is to produce the students for the class. It is difficult to keep a course on the schedule if you cannot populate the classroom with students. Unfortunately, the Field of Dreams response, "They will come," is not good enough. We believe we have a winner in this course that fills a need and will be popular with students. Now we have to sharpen our marketing and communications skills to convince students of that.

Much Ado About Something

by
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University of Connecticut

Employment law specialists are paying particularly close attention as to how the United Stated Supreme Court will be disposing of a recent appeal from a N.L.R.B. decision severely curtailing small group/quality circle management strategies. For the past generation ballyhooed by many as the wave of the future, this approach was to bring an end to the adversarial nature of American labor relations and inaugurate a brave new world of contented and improving employees. Labor unions, however, did not adopt such a roseate, utopian view of the situation. They looked upon the program as a less than subtle management tool that psychologically manipulated employees into internalizing passivity and acceptance of management *diktat*. Recently, the N.L.R.B., upon complaint of the Teamsters, held it was also a violation of Federal labor law because it undermined the position of the duly certified union as the exclusive bargaining agent on questions involving wages and working conditions. While the N.L.R.B. hinted some use might be made of these circles for safety improvements--as a sort of glorified suggestion box, it nonetheless decided for the unions. One can only imagine the electrifying shock this has caused in certain academic circles that preached this new style of management in quasi-religious cult terms. The Supreme Court is expected to reach its decision around the time this newsletter appears. So stay tuned for the next thrilling episode in this ongoing melodrama. And if the Supreme Court should uphold the N.L.R.B., far be it from us to suggest that what was once dogmatically pronounced as Holy Writ was in reality premeditated instruction activities illegal under Federal labor statutes.

Family and Medical Leave Act of 1993

by
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One of the first bills signed by President Clinton upon taking office was the Family and Medical Leave Act of 1993 (the "FMLA") which went into effect on August 5, 1993. This ground breaking piece of legislation requires employers with fifty or more employees within a seventy-five mile radius to provide up to twelve weeks of unpaid leave under the following circumstances:

1. The birth or adoption of a child.
2. The care of a spouse or an immediate family member with a serious health condition.
3. The inability to work because of a serious health condition.

Special rules have been adopted for teaching faculty at primary and secondary schools; colleges and universities are not included in that category and are not accorded special treatment. Health coverage that was provided prior to the leave must be maintained during the period of leave. When the employee returns to work at the end of the leave, the employee must be reinstated to the same or equivalent job. In order to be eligible, the employee must have worked for the company a minimum of twelve months and worked for at least 1,250 hours during the year before the leave.

The employer has discretion as to a number of issues. The employer can determine whether the twelve month period will be measured by calendar or fiscal year or by a twelve month period rolling backward or forward from the first date the leave is used, provided the method of measurement is consistently applied. It is up to the employer to decide whether or not the leave can be extended to twenty-four weeks by taking a twelve week leave at the end of one year and another twelve week leave at the beginning of the next year. Questions regarding the taking of paid sick leave prior to the unpaid leave and the taking of the leave over a long period of time in small increments as opposed to one long stretch can also be determined by the employer. Second and third opinions may be required by employers to verify the reason given for the leave.

Leaves taken for the birth or adoption of a child must be taken and completed within the first year after the birth or placement. Family medical leaves can be taken for the illness of a daughter, son, spouse or parent, but not for parents-in-law. Employers are prohibited from interfering with, restraining or denying the exercise of any right provided under the FMLA, pursuant to a "Notice to Employee" published by the Wage and Hour Division. Employee complaints will be investigated and can be resolved by the Labor Department. In addition, employees may pursue private civil actions in courts.

Although the FMLA represents a breakthrough for Congress, finally coming to grips with the realities of people's lives and their impact on the workplace, the Act is nevertheless a compromise between employee and employer advocates. Employees had hoped for provisions mandating paid leave as adopted by many European countries, while employers complained that the Act imposed an additional burden and expense on their already overburdened backs.

The fact is that many companies have already adopted family leave policies that enable both male and female employees to take time off for the birth or adoption of a child or to care for an ill relative. In addition, some states have previously enacted legislation more sympathetic than the FMLA towards employees. In light of these developments, the FMLA will probably not effectuate that great a change on the American workplace. Its greatest impact will be to formalize a process that was often informal and ad hoc and to convert the leave from a negotiated benefit

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FMLA *continued* . . .

that could be eliminated to a right that cannot be denied.

The FMLA is certainly timely. Pursuant to figures reported in "The Family and Medical Leave Act" by Panel Publishers, 63% of women with children work and 20%-30% of the population now care, or anticipate caring within five years, for an elderly relative. With so many women now working, the traditional stay-at-home caretaker is no longer available to deal with medical emergencies. Employers should accommodate both male and female workers by enabling them to address pressing personal issues while maintaining employment.

Seen by many as a pro-feminist piece of legislation, the FMLA is more probably a concession to the baby boom generation who have become the sandwich generation, caught between the pressures of caring for their children and caring for their aging parents. To the extent that the FMLA can afford these hard-pressed workers the opportunity to handle the conflicting exigencies of their complicated lives, it will be a valuable addition to the growing body of employment legislation.

Arresting Lawyers' Destiny

or Creating Your Own Opportunities

by
Timothy E. Paul, P.H.R.
Emporia State University

As lawyers leave academic settings, an increasing number of them are either not being replaced or are being replaced by attorneys who teach part-time. Repeated efforts have considered limiting or removing Business Law or law classes from business school curricula. Neither of these developments bode well for members of the bar who have accepted the profession of teaching. Management and other non-legal faculty continue to block lawyers' entry into business courses that do not have the word "law" in them.

It is time to consider what alternatives are available to reduce or prevent the erosion of lawyers' expertise, in academic environments. The primary question is "What can we do?"

The Chair of the Management Division at our university wanted to capitalize on the availability of unscheduled credits during the Summer 1993 term. I was ready. Of five proposals, three were selected. But, how to qualify me? He relied upon my certification as a Professional in Human Resources. Certification is effective for three years and may be acquired by passing an examination. The Society of Human Resource Management is the agency that manages the testing program. They may be contacted through the following address:

Human Resource Certification Institute
606 North Washington Street
Alexandria, Virginia 22314
Phone: (703) 548-3440
Fax: (703) 836-0367

Cornelia Cont is the Manager and Program Administrator. You may want to request the Certification Information Handbook. You may also wish to contact:

Human Resource Certification Program
The Psychological Corporation
P.O. Box 839961
San Antonio, TX 78283-3961

The examination is offered several times a year and it covers the following functional areas:

Management	15%
Selection & Placement	20%
Training & Development	20%
Comprehension & Benefits	20%
Employee & Labor Relations	20%
Health, Safety & Security	5%

A passing score is 70% (175 out of 250). Anyone who qualifies as a human resource educator (i.e. you have taught employment or labor law or have been in that area for at least four years) may take the exam. Incidentally, of the May 1, 1993 examinees, 83% passed, while 88% of the May 24 examinees passed.

There is another alternative to this testing process. Try taking two years off and spending $20,000 for an MBA.

If you would like to write an article for the newsletter, or even a blurb which discusses your article, please send or fax it to Roger Johns, Eastern New Mexico University, College of Business, Station 49, Portales, NM 88130. Phone (505) 562-2332. FAX (505) 562-4331.

Employment and Labor Law Section Newsletter

Laura Pincus, DePaul University
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Employment and Labor Law Section Update

by
Co-chairs
Employment and Labor Law Section
Dawn Bennett-Alexander
Laura B. Pincus

By now, you should have received your gold-embossed (or practically) edition of the Section newsletter. If you have not received a copy, please contact Dan Herron. This was compiled through the sweat of your peers, and the prize for most dedicated goes to our Associate Editor, Roger Johns, Jr. The newsletter is now looking for submission for its Fall edition; please send all articles to Roger Johns, Eastern New Mexico University, College of Business, Portales, NM 88130 or call Dawn Bennett-Alexander at (706) 542-4290. Submissions may discuss any related topic and need not be longer than a page or so.

During the conference, and in particular at the Section breakfast, the Section developed an agenda for the next several years. There are a number of exciting developments. First, the *Journal of Legal Studies Education* is planning a symposium for next year's conference which shall focus on "Teaching Employment Law." While it is encouraged, presenters need not have a completed paper prepared for the symposium, and we encourage all individuals with some interesting or innovative technique or strategy for teaching employment law to contact the *Journal*. Speaking of our scholarly publications, the *American Business Law Journal* has also expressed an interest in publishing a special issue relating to a substantive issue of employment. This area has not yet been narrowed down, but John Blackburn has agreed to serve as the Special Editor of that volume. Accordingly, if you are working on an article of specific significance in the area of employment law, please speak with Laura Pincus or John Blackburn about its possible inclusion in the issue. Of course, the paper itself will need to go through the standard *ABLJ* review process, nonetheless.

This year's debate on Amendment 2 was well attended, with upwards of sixty Academy members in the audience. In addition, a reporter and cameraperson from News 11, a CBS affiliate in the Springs, attended and reported on the debate during both the 5:30 and 10:00 broadcasts. (They even got the names right of the Academy and the Sections!) For next year's debate, we have spoken with the International Section and have decided to bring in speakers to discuss the employment and labor implications of NAFTA. Mark Blodgett (Georgia Southern University), a member of both sections, has agreed to help orchestrate the discussion. If you are interested in assisting Mark, or know of an appropriate speaker, contact him at (912) 681-5678.

In addition, we would be happy to help you to coordinate special panel discussions for next year's meeting on topics of interest to you. If you have an interest in this area, please contact Laura Pincus at (312) 362-6569. If we've left anything out, we'll be sure to include it in the next Newsletter! Hope you all enjoyed yourself at the conference or during the summer. We look forward to hearing from you if there's anything we can do to make employment and labor law information a little more accessible!

Recent Developments in Employment Law

by
Roger J. Johns
Eastern New Mexico University

■ EMPLOYMENT DISCRIMINATION

Title VII Actions (Single-Filing Rule)

With *Calloway v. Partners National Health Plan*, 986 F.2d 446 (11th Cir. 1993), the Eleventh Circuit (formerly part of the Fifth Circuit) has, again, expanded the scope of its single-filing rule. Normally, before a claimant can file a private Title VII suit, she must first file a charge with the EEOC and, thereafter, be issued a "right to sue" notice. The single-filing rule allows a Title VII *claimant* to become a Title VII *plaintiff* without meeting this requirement. The rule first appeared in *Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496 (5th Cir. 1968), where, in the context of a class action suit, unnamed plaintiffs were allowed to rely on the EEOC charge that had been filed by the named plaintiff. In *Wheeler v. American Home Products Corp.*, 582 F.2d 891 (5th Cir. 1977), the rule was expanded to allow intervenors to rely on the charge filed by the original plaintiffs. And, in *Crawford v. United States Steel Corp.*, 660 F.2d 663 (5th Cir. Unit B 1981), the rule was expanded to allow plaintiffs in multiple-plaintiff, non-class action lawsuits to rely on the charge filed by a co-plaintiff. For the first time, in *Calloway*, the court has allowed a Title VII plaintiff to sue in reliance upon the EEOC charge filed by an unrelated plaintiff in a completely independent lawsuit. The expansion of the rule is limited to situations where the relied-upon charge is valid and the claims of both plaintiffs arise out of similar discriminatory treatment, by the same defendant, in the same time frame. (*Calloway*, at 450).

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Proving Disparate Treatment (Pretext-Plus)

On June 25, 1993, the U.S. Supreme Court resolved the "pretext-plus" controversy by answering the question of "whether, in a suit against an employer alleging intentional racial discrimination in violation of §703(a)(1) of Title VII . . . , the trier of fact's rejection of the employer's asserted reasons for its actions mandates a finding for the plaintiff." (*St. Mary's Honor Center v. Hicks*, No. 92-602, slip op. (U.S.Sup.Ct., June 25, 1993)). In a 5-4 decision, the Court answered this question in the negative (*Id.* at 8) and, in so doing, appears to have substantially weakened the *indirect* method of proving disparate treatment it set forth in *Texas Department of Community Affairs v. Burdine* (450 U.S. 248 (1981)).

Melvin Hicks, a black man, was demoted and eventually terminated from his job at a Missouri correctional facility, by a white supervisor. The defendant asserted that termination resulted from the accumulation and severity of work rule violations. Hicks refuted these assertions by showing that he was disciplined more severely than co-workers who had committed equally or more severe rule violations. (*Hicks v. St. Mary's Honor Center*, 756 F.Supp. 1244 (E.D.Mo. 1991) at ___). Nevertheless, even though Hicks proved a prima facie case of racial discrimination and refuted the defendants' asserted nondiscriminatory reasons for its actions, he lost. The appellate court reversed, holding that, "[o]nce the plaintiff proved all of defendants' reasons for the adverse employment actions to be pretextual, plaintiff was entitled to judgment as a matter of law." (*Hicks v. St. Mary's Honor Center*, 970 F.2d 487 (8th Cir. 1992) at _). The Supreme Court reversed the Court of Appeals, holding that proof that a defendant's proffered nondiscriminatory reasons are untrue does not, by itself, amount to proof of illegal discrimination.

In *McDonnell-Douglas Corp. v. Green* (411 U.S. 792 (1973)), the Court allocated the relative burdens of production and the order of presentation of proof, between the plaintiff and the defendant, in disparate treatment cases. First, the plaintiff must *prove* a prima facie case of unlawful discrimination, by the defendant. (*Id.* at 802). This creates a presumption which, if unrebutted, will result in a finding that the defendant has engaged in unlawful discrimination. (*Burdine* at 254). The defendant must then "articulate some legitimate, non-discriminatory reason [for its actions]." (*McDonnell-Douglas* at 802). The defendant need not *prove* the reasons behind its actions (*Burdine* at 257-8); it need only "clearly set forth" the reasons "through the introduction of admissible evidence." (*Id.* at 255). Once the defendant sets forth its nondiscriminatory reason, the presumption created by the prima facie case is rebutted and drops from the case (*Id.* at 255), and the burden shifts back to the plaintiff, to "demonstrate by competent evidence that the presumptively valid reasons for [the defendant's actions] were in fact a coverup for a . . . discriminatory decision." (*McDonnell-Douglas* at 805). *Burdine* provided two ways to accomplish this demonstration. "[The plaintiff] may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or *indirectly* by showing that the employer's proffered explanation is unworthy of credence." (*Burdine* at 256, emphasis added).

Some circuits took *Burdine* to mean that a plaintiff could indirectly prove intentional discrimination simply by demonstrating that the reason asserted by the defendant was not the true reason for the defendant's action. (*Hicks v. St. Mary's Honor Center*, 970 F.2d 487 (8th Cir. 1992); *Tye v. Board of Education of Polaris Joint Vocational School District*, 811 F.2d 315 (6th Cir. 1987); *King v. Palmer*, 778 F.2d 878 (D.C. Cir. 1985); *Duffy v. Wheeling Pittsburgh Steel Corp.*, 738 F.2d 1393 (3rd Cir. 1983)). Other circuits, however, held that such proof, alone, did not compel a finding that illegal discrimination had occurred. (*EEOC v. Flasher*, 986 F.2d 1312 (10th Cir. 1992); *Samuels v. Raytheon Corp.*, 934 F.2d 388 (1st Cir. 1991); *Holder v. City of Raleigh*, 867 F.2d 823 (4th Cir. 1989)). Adherents of this latter view were said to advocate the "pretext-plus" rule, because they required the plaintiff to prove that the defendant's proffered nondiscriminatory reason was not the true reason behind its actions, *plus* prove that the true reason was a discriminatory one.

In *St. Mary's*, the Court sides with the adherents of the pretext-plus rule, holding that while "rejection of the defendant's proffered reasons, will *permit* the trier of fact to infer the ultimate fact of intentional discrimination" (*St. Mary's*, slip op. at 8) rejection does not *compel* a finding of discrimination, as a matter of law. (*Id.*). Such an inference of discrimination, based upon rejection of the defendant's asserted nondiscriminatory reason, is supportable when the factfinder's disbelief of the reason, "together with the elements of the prima facie case," is "accompanied by a suspicion of mendacity." (*Id.*). Further, in *St. Mary's*, the Court discounts its earlier statement from *Burdine*, that a plaintiff could indirectly prove intentional discrimination by proving that the defendant's proffered reason was not worthy of credence. The Court characterized this statement as inadvertent dictum and inconsistent with the remainder of *Burdine* (*St. Mary's* at 14).

A great deal of the pretext-plus controversy appears to have arisen out of a misapprehension of the meaning of the word "pretext," as it was used in *Burdine*. There, the Court stated that, "the plaintiff must . . . have an opportunity to prove by a preponderance of the eveidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination" and that this could be done by proving that the defendant's reason was not worthy of credence (*Burdine* at 253). Some courts equated proof of "pretext" with proof that the defendant's reason was false or not worthy of credence. (*See cases cited in fourth paragraph, supra*). The pretext-plus courts interpreted "pretext" to mean that the offered reason must be proved false and that, in addition, discrimination must be proved as the true reason. (*Id.*). In *St. Mary's*, the Court confirmed that the pretext-plus courts were correct. (*St. Mary's* at 8, n.4, and at 13). This interpretation is consistent with the definitions of pretext found in Black's Law Dictionary, Fifth Edition ("[o]stensible reason or motive assigned or assumed as a color or cover for the real reason or motive") and in Webster's Third New International Dictionary (1965 Edition) ("a purpose or motive alleged or an appearance assumed in order to cloak the real intention or state or affairs").

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Nevertheless, in its eagerness to demonstrate its command of the definition of "pretext," the Court has ignored two profound problems this decision creates. First, the Court makes it quite clear that even if the defendant's nondiscriminatory reason turns out to be false, so long as the defendant has asserted *some* reason, it has met its burden of production and the presumption created by the prima facie case is eliminated. So, as a practical matter, the only way a defendant fails to meet its burden of production is, literally, to remain silent in the face of the plaintiff's case. (*St. Mary's*, slip op. at 8, *and see Burdine* at 254).

The second problem arises once the plaintiff has refuted any nondiscriminatory reasons articulated by the defendant. If, after refuting the reasons articulated by the defendant in response to the prima facie case, the plaintiff's evidence fails to exclude all other hypotheses of lawful behavior by the defendant, the plaintiff loses. (*See St. Mary's*, slip op. at 20). The practical effect of this is that, in order to avail himself or herself of what is left of the *Burdine* indirect method of proof, the plaintiff is now required to discern and disprove every explanation, stated or implied by the defendant's evidence, that might provide a legal justification for the defendant's behavior. This is especially troubling since, in *St. Mary's*, the plaintiff's case was defeated by an explanation that was never stated explicitly by the defendant; it was noted only by the trial judge and, even then, it existed only by negative implication. "[A]lthough the plaintiff has proven the existence of a crusade to terminate him, he has not proven that the crusade was racially rather than *personally* motivated." (*Hicks v. St.Mary's Honor Center*, 756 F.Supp. 1244, _(E.D.Mo. 1991), emphasis added). The defendant had neither asserted nor proved that Hicks' termination was based upon his supervisor's *personal* dislike for him, but since the record did not exclude such a finding, and since the plaintiff failed to disprove that personal animosity was the reason for his termination, he lost. The inescapable implication from this is that, for plaintiffs attempting indirect proof of illegal discrimination, judgment for the plaintiff is *compelled* only if the plaintiff refutes all conceivable nondiscriminatory reasons. By allowing any reason suggested or not excluded by the record to defeat the plaintiff's case, an already prodigious task is rendered virtually impossible. If a nondiscriminatory reason either lurks in or is not excluded by the record, and the plaintiff fails to spot it and refute it, the plaintiff loses. Apparently, the requirement in *Burdine* that the defendant "*clearly set forth*" its reasons, was also inadvertent dictum. The Court could have easily avoided this inequity by holding that only explicitly stated reasons will suffice to meet the defendant's burden of production and by providing an assumption that the defendant will always explicitly state all reasons for its actions. If a defendant has lawful reasons for its actions, then presumably it can and will state such reasons. If, on the other hand, a reason is not explicitly stated, but has to be wrung from the record, then presumably that reason was never so clearly within the ambit of the employer's knowledge that it could have contributed to the employer's motivation. As such, it should not provide a serendipitous defense for the defendant.

English-Only Rules

In a case of first impression, the Ninth Circuit has expanded the scope of the disparate impact concept to encompass cases brought under Title VII, §703(a)(1). The court also rejected the EEOC Guideline which provides that an employee establishes a prima facie case of disparate impact simply by proving the existence of an English-only rule. (*See* 29 C.F.R. § 1606.7 (a) and (b)). In *Garcia v. Spun Steak Company* (998 F.2d 1480 (9th Cir. 1993)), the plaintiffs argued that Spun Steak's English-only rule denied them the ability to express their cultural heritage on the job, denied them of the ability to speak their primary language (a privilege enjoyed by monolingual English speakers), and created an atmosphere of inferiority, isolation and intimidation. The plaintiffs won, on a motion for summary judgment, and Spun Steak appealed. The court noted that theretofore, all of its disparate impact cases had "involved plaintiffs who claimed that they were denied employment opportunities as the result of artificial, arbitrary, and unnecessary barriers that excluded members of a protected group from being hired or promoted, not plaintiffs contending that they were subjected to harsher working conditions than the general employee population." (Citations omitted) (*Id.* at 1485). Nevertheless, it found that the disparate impact theory could encompass cases where the complained of behavior simply made the workplace harsher, as opposed to creating barriers to employment or advancement. (*Id.*). Notwithstanding this expansion of disparate impact coverage, the court held that the activities abridged by the English-only rule were not protected by Title VII. (*Id.* at 1487-8) The court also held that a per-se rule invalidating an English-only rule, as conducive to a hostile and abusive workplace is inappropriate since the effects of an English-only rule are matters of fact and the legal consequences thereof should be determined on a case-by-case basis. (*Id.* at 1489).

If the court sticks to its guns on this expansion of the disparate impact theory to cover cases involving disparities in the terms, conditions, and privileges of employment, an additional avenue for hostile workplace-type sexual harassment cases could emerge. The Supreme Court has explicitly reserved the issue of whether the disparate impact theory applies to § 703(a)(1) cases. (*Nashville Gas Co. v. Satty*, 434 U.S. 136, 98 S.Ct. 347, 54 L.Ed.2d 356 (1977)).

In an odd twist on the workplace language issue, an English speaking former clerk is pressing a discrimination claim against her former employer, Bellevue Hospital Corporation, and one of its supervising nurses, alleging that the use of Tagolog by the supervising nurse and other nurses effectively excluded her from conversations and kept her from obtaining important patient information. (*McNeil v. Aguilos and Bellevue Hospital Corporation* (No. 91 Civ. 6938, S.D.N.Y.)).

Sexual Harassment (Reasonable Woman Test)

With *Burns v. McGregor Electronic Industries, Inc.*, No. 92-2059, (8th Cir. 1993), the Eighth Circuit joins several other circuits in adopting the reasonable woman standard for determining whether conduct amounts to sexual harassment. The Michigan Supreme Court, in *Radtke v.*

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Everett, 501 N.W.2d 155 (Mich. 1993), has adopted the "reasonable person" standard (and rejected the "reasonable woman" standard) as the proper standard for determining whether, under the Michigan Civil Rights Act, alleged sexual harassment results in a hostile work environment.

Americans With Disabilities Act (Interim Regulations)

On June 4, 1993, interim final regulations implementing the ADA were issued by the Wage and Hour Division of the Department of Labor. The regulations take effect on August 5, the same day the ADA becomes effective. (58 Fed. Reg. 31794 (1993) (to be codified at 29 C.F.R. Part 825)).

■ **ERISA**

Plan Administrators

A split between the First and Tenth Circuits has been established, in *McKinsey v. Sentry Insurance*, 986 F.2d 401 (10thCir. 1993), over whether a plaintiff can maintain a claim against a "de facto" plan administrator. ERISA permits the designation of a plan administrator and provides that such a designated plan administrator may be held personally liable for failing to provide certain information to plan participants in a timely manner (29 U.S.C. § 1132(c)(1)). In *Law v. Ernst & Young*, 956 F.2d 364 (1st Cir. 1992), the First Circuit held that an entity other than the designated administrator, which had assumed and controlled the administrator's function, could be held liable as the "de facto" plan administrator. While, the statutory definition does not confer the status of plan administrator on one who simply exercises the function of the administrator (29 U.S.C. § 1002(16)(A)), the First Circuit reasoned that to hold otherwise would doom '§1132-failure-to-inform' suits when the failure was on the part of non-administrators who performed the responsibilities of the administrator. In *McKinsey*, the Tenth Circuit rejects the First Circuit approach as unnecessary (failures by non-administrators to provide information under §1132 can always be imputed to the statutory administrator) and beyond the clear words of the statute. (*McKinsey*, at 404).

A Step-by-Step Approach to Determining Reasonable Accomodation Under the ADA

by
Charlie C. Jones
East Central University

The Americans with Disabilities Act (the "ADA") was signed into law on July 26, 1993. The purpose of Title I of the Act is to eliminate obstacles that prevent qualified individuals with disabilities from enjoying the same employment opportunities available to non-disabled individuals. One method that Title I of the ADA uses to remove barriers to equal employment opportunity for the disabled is to require employers to make reasonable accomodations to job applicants or employees with disabilities. In fact, under Title I, it is unlawful discrimination *not* to make reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability, unless the employer can show that the acommodation would impose an undue hardship on the employer's business. It is also unlawful discrimination to deny employment opportunities to an otherwise qualified individual with a disability if such denial results from the need of the employer to make a reasonable accommodation to that person.

In general, a reasonable accommodation is any change in the work environment or in the way things are usually done that enables a person with a disability to enjoy equal employment opportunities. More specifically, the EEOC Regulations set forth three basic categories of reasonable accommodation:

1. Modifications or adjustments to the job application process that enable a qualified applicant with a disability to be considered for the job such applicant desires;

2. Modifications or adjustments to the work environment, or to the manner of circumstances under which the job held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that job; and,

3. Modifications or adjustments that enable an individual with a disability to enjoy the equal benefits and privileges of employment as are enjoyed by similarly situated non-disabled employees.

In most cases, the appropriate reasonable accommodation will be so obvious that it will be unnecessary to proceed in a step-by-step fashion. However, in some cases, neither the individual requesting the accommodation nor the employer can readily identify the appropriate accommodation. This is best done through a flexible, interactive process that involves both the employer and the qualified individual with a disability seeking the accommodation.

The best way to acomplish this is to adopt a formal problem-solving process whose steps help keep the decision maker focused on the facts surrounding the situation and the logic needed to effectively solve the problem. The first step in any formal problem-solving process is to define precisely what needs to be done. In the context of providing an appropriate reasonable accommodation, this requires an identification of the barriers that are preventing the person with a disability from having an equal employment opportunity. For example, if an employee with a disability is having problems performing a job, the employer should analyze that particular job to determine its purpose and essential functions. Once the employer has identified the essential functions of the job, it then knows which functions an accommodation must enable that employee to perform.

Second, alternative courses of action for solving the problem should be identified. At this point, the employer should consult with the employee requesting the accommodation so that the specific limitations imposed by that person's

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STEP-BY-STEP *continued*...

disability may be determined. Once this is done, *all possible* accommodations that would solve the problem can be listed. Often, the person with a disability is the best source to devise possible accommodations. The employer is obviously another good source, since it knows its operations and, therefore, should be able to suggest effective alternatives. Other sources for possible alternatives might include other employers, the EEOC, state and local rehabilitation agencies, or disability constituent organizations.

Third, each alternative generated in the second step should be evaluated in terms of its feasibility, its satisfactoriness, and its consequences. The question of feasibility requires determining whether the accommodation could be implemented by the employer. For example, an alternative identified in the second step may require a modification to the employer's machinery that is not possible, given the make and/or model of its machines. Given these circumstances, this alternative would not be feasible and, thus would be removed from further consideration.

When an alternative has passed the test of feasibility, it must be examined to see if it would be satisfactory. Satisfactoriness refers to the extent to which the alternative would satisfy the problem as identified in the first step. For example, assume that an alternative identified in the second step and which had been determined to be feasible would not, upon closer evaluation, allow the employee to fully overcome a barrier to performing his or her job. This alternative would not be satisfactory and, therefore, would be eliminated from further consideration.

Finally, when an alternative has proved both feasible and satisfactory, its probable consequences should be assessed. This requires an examination of the alternative to see how it would affect other parts of the employer's business and to determine its financial and nonfinancial costs. If the consequences of adopting the alternative would cause an undue hardship on the employer's business, the alternative would not have to be adopted even though it is both feasible and satisfactory.

Fourth, if more than one alternative has passed the triple test of feasibility, satisfactoriness, and affordable consequences, then a choice of one of the remaining alternatives must be made. It is important to note that the reasonable accommodation required by this part does not have to be the "best" accommodation possible. All that is required is that the accommodation provide an opportunity to the person with a disability to attain the same level of performance or to enjoy the same level of benefits and privileges of employment as are available to the average similarly situated non-disabled employee.

At this point, the individual with a disability should again be consulted to see if he or she has a preference as to the remaining alternatives or if he or she would prefer to provide his or her own accommodation. However, the employer providing the accommodation has the ultimate discretion to choose between the remaining accommodations, and may choose the least expensive accommodation or the accommodation that is easier for it to provide. Furthermore, it should be noted that the individual's willingness to provide his or her own accommodation does not relieve the employer of its duty to provide the accommodation should the individual for any reason be unable or unwilling to continue to provide the accommodation.

Fifth, after an alternative has been selected, the employer must put it into effect. In some cases, implementation may be easy; in others, it may be more difficult. for example, present employees may resist the change required by the adoption of the chosen alternative. In these situations, the employer must take steps to reduce this resistance. Also, it should be recognized that, even when all alternatives have been evaluated as precisely as possible and the consequences of each alternative weighed, unanticipated consequences may still arise. In these cases, the employer may need to repeat one or more of the preceding steps in this process.

As the final step in this problem-solving process, the employer should evaluate the effectiveness of its decision - that is, it should make sure that the alternative chosen has served its original purpose. For example, if the initial problem was the inability to perform a function of the job without an accommodation, then the employer should check to see if this has now been accomplished. If an implemented alternative appears not to be working, the employer should then go back and determine why the alternative failed. Once this is accomplished, the employer should correct the problem by making the necessary adjustments or by returning to the first step in the process of determining an appropriate reasonable accommodation.

Employment Law Sample Syllabus

from
Laura B. Pincus

Laura Pincus has consented to the inclusion of the following syllabus from her Employment Law class. It is offered here as a possible format for those interested in developing courses in employment law, and in an effort to foster discussion and sharing of information about existing employment law courses.

The purpose of this course is to analyze the impact of employment-related statutes and case holdings on the business environment. The focus of the class will be on the impact of these laws and holdings on business decisions.

The federal laws and guidelines relating to the employment relationships are numerous. This course, however, will focus on those laws that have the greatest impact on personnel decisions. Those include the following: the United States Constitution, Title VII of the Civil Rights Act of 1964, the Uniform Guidelines of Employee Selection Procedures, the EEOC Guidelines on Discrimination Because of Sex, the Age Discrimination in Employment Act, EEOC Guidelines on the ADEA, the Rehabilitation Act and the Americans With Disabilities Act, the Fair Labor Standards Act, the Occupational Safety and Health

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SYLLABUS *continued* . . .

Act, and the Employment Retirement Income Security Act.

The course will present issues and caselaw related to the commencement of the employment relationship, terms and conditions of the relationship, discrimination in recruitment, employment and discharge, and wrongful termination. Of primary interest will be necessary personnel or employment decisions and their ramifications.

While the precise wording of the relevant statutes and guidelines is evidently crucial to any analysis of their effect, the course will concentrate on the examination of the court holdings interpreting the language and intent of the statutes, and their relation to the facts of each case. Using this method, the student will better understand how the courts would apply the employment regulations to the facts any situation may present.

This class will consist of lectures, exercises, case brief and analysis, and classroom discussion of legal problems and current legal issues. Students will be responsible for preparing classroom discussion on one or more cases of readings during the course of the quarter. This will involve reading the case, and preparing a presentation and discussion questions for the case.

Section I

Work and Its Relation to Society

Methods of Analytical Reasoning, Legal Development and History of the Law Relating to Employment.

Section II

Discrimination

Sources of Protection. What is discrimination? How is it proven? Remedies.

Book: [*Griggs, Connecticut, Teamsters*], [*McDonnell Douglas*], [*Wards Cove Packing Co. v. Antonio*]

Section III

Protected Classes and Unique Bases for Actions

Discrimination on the Basis of Gender, Pregnancy/Fetal Protection, Wage Comparability, Comparable Worth, Equal Pay Act, Discrimination on the Basis of Affectional Preferences, Discrimination Because of Sexual Activity.

Book: [*Diaz, Dothard*], [*Gunther, Manhart, Newport News, Johnson Controls], [Sedita, Lynch], Pregnancy Discrimination Act,* "Discharge of Man . . .," [DeSantis, Williamson, Ulane], [*Price Waterhouse]*

Section IV

Protected Classes, Continued

Sexual harassment as the Basis of Gender Discrimination, Quid pro quo, Hostile environment, Discrimination on the Basis of National Origin, Discrimination on the Basis of Age, Age Discrimination in Employment Act.

Book: [*Meritor*], [*Criswell*], "Texas Appeals Court Affirms . . ." [*Espinoza*], [*Carino*]

Section V

Protected Classes, Continued

Discrimination on the Basis of Disability, Federal Regulation: Americans With Disabilities Act/Rehabilitation Act, AIDS issue and employment consequences, Discrimination on the Basis of Religion, Affirmative Action and "Reverse" Discrimination.

Book: [*Arline*], [*Amos, Hardison*], [*Wygant*], [*State Division v. Xerox*], *Cronan v. N.E. Telephone*

Section VI

Group Project

Handout: Will be distributed.
Discrimination Project Due

Section VII

The Employment Relationship

Who Constitutes An Employee? Establishment of the Relationship, Recruitment, Advertisements, Selection, Information Gathering, Application Forms, Interviews, References, Negligent Hiring, Testing.

A. Honesty/Polygraphs
B. Personality Tests/ Psychological Screening
C. Drug/Alcohol Testing
D. AIDS Testing
E. Medical Screening

Book: [*Darden*], [*Cort*], [*Lewis*], [*Maloney*]
Group Project Due From Last Week

Section VIII

Terms of Employment

Benefits, Wages and Hours, Conditions of Employment, Work Environment, Grooming and appearance requirements, Regulation of Off-Duty Conduct.

Book: [*Willingham*], [*Rulon-Miller*] [*Hariss*]

Section IX

Discharge

Wrongful Discharge, Breach of Implied Terms, Retaliatory Discharge, Discharge as Violation of Public Policy, Constructive Discharge, Common Law Protections.

Book: [*Pugh*], [*Palmateer*], [*Agis*]
Final Paper Due

Announcements

E-Mail Directory

In order to facilitate faster and more frequent communication and exchange of ideas between members of the Employment and Labor Law Section, an E-Mail directory is being compiled. If you would like to be included in the directory, please send your name and E-Mail address to the Associate Editor, Roger Johns, (johnsr@email.enmu.edu) at Eastern New Mexico University. Please indicate whether your address is a Bitnet or an Internet address. Of course, you may include both, if you have both.

NAFTA Forum

The Employment and Labor Law Section and the International Law Section have agreed to sponsor a NAFTA Forum at next year's ALSB meeting in Dallas, Texas. This forum will address employment issues relative to this international trade agreement. If you have suggestions for speakers or other programming details, please contact Laura Pincus at (312) 362-6569, Dawn Bennett-Alexander at ((706) 542-4295, Carolyn Hotchkiss at (617) 239-5528, or Mark Blodgett (912) 681-5678.

Midwest Academy of Legal Studies Annual Meeting

The Midwest Academy meets on March 17 and 18 in Chicago at the Palmer House Hotel. As usual, employment law papers and presentations are well represented at the meeting. In addition, in celebration of the opening of the new DePaul Center one block from the Palmer House, DePaul University's Kellstadt Graduate School of Business is hosting a cocktail reception at the Center on Thursday, March 17, from 5:00 - 6:30 pm. There will be wine and hors d'oeurves, as well as a presentation by Philip Kemp, Director of DePaul's Program for the Enhancement of Teaching entitled, "Innovative Methods for Case Teaching." All attendees are invited. While the registration date for paper presentations has passed, for further information on attending the meeting, please contact Laura Pincus at (312) 362-6569.

The following employment law-related papers will be presented:

Family and Medical Leave Act of 1993: Impact on Employees, Elinor Rahm, Central Missouri State University

Reinstatement under the Family and Medical Leave Act: Employer and Employee Perspectives, Marilyn Meuller, Simpson College

Health Care Providers and AIDS, Judy Welch, Southwest Missouri State University

The Availability of Liquidated Damages in ADEA Litigation: A Consideration of the 'Willfulness' Standard, Joseph Pellicciotti, Indiana University Northwest

Firing for Dollars: Work Force Reduction Strategies and Ethics, Albert D. Spalding, Jr., Wayne State University

The Potential Implications of Recent Sexual Harassment Decision on Classroom Discussion, Joseph J. Solberg, Illinois State University

Sharing Power: The Lesson of *Electromation*, Anna Rominger, Indiana University Northwest

Failure to Pay Employee Trust Fund Taxes Withheld, A Trap for the Unwary, R. Wayne Saubert, Radford University

Deciphering the Americans With Disabilities Act, Wayne L. Anderson, Southwest Missouri State University

Americans With Disabilities Act of 1990 and Small Business, Joelle Weiss-Bjorke, Winona State University & Theressa Arrick-Kruger, St. Cloud State University

The Reasonable Woman Standard: Beyond Gender Equity in the Workplace, Sarah Fowler, Roosevelt University

Interference with Employee Benefits in Plant Closings, Dana Muir, University of Michigan

A Defense of Employment-at-Will, Paul Hodapp, University of Northern Colorado

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