



Employment and Labor Law Section Newsletter

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Unanimous Sexual Harassment Decision: An Invitation to Future Litigation

by

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The Supreme Court's unanimous opinion in *Harris v. Forklift Systems, Inc.*, 114 S.Ct. 367 (1993), held that whenever a reasonable person deems unwelcome verbal or physical conduct of a sexual nature to be sufficiently pervasive and severe in the workplace, then that conduct constitutes a hostile or abusive work environment and is illegal sexual harassment. When taken together with the access to a jury and to compensatory and punitive damages, both of which the Civil Rights Act of 1991 makes available to employees complaining of intentional discrimination, the *Harris* decision provides a sensible and strong legal remedy for harassment in the workplace.

However, the understandable attention to the facts of this case of sexual harassment, and the welcome fact that it is a unanimous decision, may lead many to overlook other dimensions that may prove to be as significant, and perhaps more significant, in the long run--specifically, its potential use for harassment cases on a basis other than gender, and the invitation to future constitutional litigation suggested by Associate Justice Ginsburg's comments in her concurring opinion.

Cases of environmental harassment also occur when employees are harassed because of their race, color, national origin, religion, age, or disability. Both the *Harris* decision and EEOC guidelines indicate the availability of environmental harassment as a theory of recovery for these other situations. In Associate Justice Sandra Day O'Connor's words, "... the very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees

because of *race, gender, religion, or national origin* (emphasis added) offends Title VII's broad rule of workplace equality." Recently issued EEOC Guidelines on harassment in the workplace on grounds other than sex define harassment as "verbal or physical conduct that denigrates or shows hostility towards an individual because of the individual's race, color, religion, gender, national origin, age, or disability or the race, color, religion, gender, national origin, age, or disability of his/her friends, relatives, or associates." Given the increasing diversity of the American workforce and cultural differences among workers, it is reasonable to anticipate the widespread use of this remedy for harassment in the workplace based on a factor other than gender.

Further, while the *Harris* decision rejects the "psychological injury test," it does not expressly address the "reasonable victim" or "reasonable woman" standard adopted by the Ninth Circuit in *Ellison v. Brady* (924 F.2d 872 (9th Cir. 1991)), the case repeatedly referred to during the Clarence Thomas hearings in the Fall of 1991. Based on studies indicating that men and women have significantly different perceptions of sexually related conduct in the workplace, the Ninth Circuit concluded that "a sex-blind reasonable person standard tends to be male-biased and to systematically ignore the experience of women." Can one conclude that the Supreme Court's adoption of the reasonable person standard in *Harris* is also, by implication, a rejection of the reasonable

victim standard? Should the reasonable victim standard be extended beyond "reasonable woman" to "reasonable African-American," to "reasonable Hispanic," etcetera? The EEOC Guidelines propose that the reasonable person standard requires taking into consideration, when assessing the severity and pervasiveness of the harassing conduct, the perspective of persons of the alleged victim's race, color, religion, gender, national origin, age, or disability.

Finally, Associate Justice Ginsburg indicated in her concurring opinion that she thinks that it is an open constitutional question whether classifications based on gender are inherently suspect. The implication is that we now have, on the Court, at least one Justice who considers that the same strict scrutiny should be applied to governmental discrimination against women as is applied to that against African-Americans. This disparity between the legal treatment accorded women and African-Americans exists also under statutory civil rights law. Compare, for example, the access and remedies available to African-American employees under section 1981 of the Civil Rights Act of 1964 and that available to women employees under Title VII as amended by the Civil Rights Act of 1991. In this statutory area of civil rights, women's organizations feel that women should enjoy the same rights and remedies that African-Americans have under section 1981.

We can anticipate, in the future, an expanded use of environmental harassment claims on grounds other than sex, and also cases challenging the constitutional standards applied to women.

Policy Decisions Employers Must make Under the Family and Medical Leave Act

by
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East Central University

On February 5, 1993, President Bill Clinton signed into law The Family and Medical Leave Act of 1993 (hereinafter referred to as the FMLA or the Act). The first major piece of legislation enacted during the Clinton administration, this statute is virtually identical to the Family and Medical Leave Act of 1992, vetoed by President George Bush in September of 1992. Under the FMLA, employees are granted specific rights. However, the exercise of these rights is often left to the discretion of the employer. Thus, the employer must decide how it wants to act, in each of these discretionary areas. Following is a list of the eight areas where employers must make policy decisions under the FMLA:

1. Calculation of the "12-Month Period"
2. Intermittent or Reduced Leave
3. Notification and Scheduling
4. Certification and Recertification
5. Paid and Unpaid Leave
6. Restoration
7. Recovery of Health Plan Premiums
8. Additional Coverage

Under the FMLA, an employer is permitted to choose any one of the following methods for determining the "12-month period" in which the twelve weeks of leave entitlement occur:

1. The calendar year
2. Any fixed 12-month "leave year," such as a fiscal year, a year required by State law, or a year starting on an employee's "anniversary" date
3. The 12-month period measured forward from the date any employee's first FMLA leave begins
4. A "rolling" 12-month period measured backward from the date any employee uses any FMLA leave (except that such measure may not extend back before August 5, 1993)

Under Methods 1 and 2, above, an employee would be entitled to up to twelve weeks of FMLA leave at any time in the fixed 12-month period selected. An employee could, thereafter, take twelve weeks of FMLA leave at the end of one year and twelve weeks at the beginning of the following year. Under Method 3, an

employee would be entitled to twelve weeks of leave during the year beginning on the first date FMLA leave is taken; the next 12-month period would begin the first time FMLA leave is taken after completion of any previous 12-month period. Under Method 4, each time an employee takes FMLA leave, the remaining leave entitlement would be any balance of twelve weeks which has not been used during the immediately preceding twelve months. For example, if an employee had taken eight weeks of leave during the past twelve months, an additional four weeks of leave could be taken. If an employee used four weeks beginning December 1, 1994, the employee would not be entitled to any additional leave until February 1, 1995. However, on February 1, 1995, the employee would be entitled to four weeks on June 1, 1995, an additional four weeks on June 1, 1995, and on December 1, 1995, four more weeks.

Employers will be allowed to choose any one of the alternatives listed above provided the alternative chosen is applied consistently and uniformly to all employees. An employer wishing to change to another alternative is required to give at least sixty days notice to all employees, and the transition must take place in such a way that the employees retain the full benefit of twelve weeks of leave under whichever method affords the greatest benefit to the employee. Under no circumstances may a new method be implemented in order to avoid the Act's leave requirements.

Leave taken by an eligible employee in order to care for a child, spouse, or parent, or because the employee is unable to perform the functions of his or her position, may be taken intermittently or on a reduced leave schedule when medically necessary. However, leave taken by an eligible employee for the birth or placement of a child may not be taken on an intermittent or reduced leave schedule

unless the employer and employee agree to such an arrangement. In addition, in cases where an employee is taking intermittent leave, or leave on a reduced leave schedule for foreseeable planned medical treatment, the employer may temporarily transfer this employee to an equivalent alternative position that better accommodates such intermittent or reduced leave. This provision gives employers greater staffing flexibility by enabling them to temporarily transfer employees who need intermittent leave or leave on a reduced leave schedule to positions that are more suitable for recurring periods of leave. At the same time, by requiring that they be temporarily assigned to an equivalent position (i.e., a position that receives equivalent pay and benefits), this provision ensures that employees will not be penalized for their need for such leave.

Under the FMLA, an employee must provide the employer with at least thirty days' notice before the date the leave is to begin for an expected birth, placement, or planned medical treatment when the need for such leave is foreseeable. However, if the date of the birth, placement, or planned medical treatment requires leave to begin in less than thirty days, the employee shall provide such notice as is practicable. For example, under normal circumstances surrounding the birth of a child, the employee would have no problem meeting the thirty days' notice requirement. But in the event of a premature birth, the employee would not be able to provide the required thirty days' notice. Similarly, parents who are waiting to adopt a child are often given less than thirty days' notice of the availability of a child.

Additionally, the Act accommodates employer needs, in cases of planned medical leave, by requiring the employee to make a reasonable effort to schedule the planned medical treatment or supervision so as not to unduly disrupt the employer's operations (subject to approval by the health care provider). For example, if an employee can schedule health care

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FMLA (continued from page 2)

treatments or supervision on nonworking days or before or after work hours, the employee would be required to do so under this provision. In cases where the employee fails to make this reasonable effort or where the employee fails to give thirty days' notice of foreseeable leave, the employer may deny such leave to the employee until the scheduling and/or notice requirements are met.

In a provision designed as a check against employee abuse of planned medical leave, an employer may require that a request for such leave be supported by a certification issued by the appropriate health care provider, and that a copy of this certification be provided to the employer in a timely manner by the employee. The term "timely manner" means that the certification shall, when possible, be provided in advance or at the commencement of the leave. If the need for leave does not allow for this, such certification should be provided reasonably soon after the commencement of the leave.

In any case in which the employer has reason to doubt the validity of the certification provided by the employee, the employer may, at its own expense, require a second opinion from a different health care provider chosen by the employer. However, the health care provider chosen by the employer may not be employed by the employer on a regular basis. If this second opinion is in conflict with the first opinion, the employer may, at its own expense, require a third opinion from a health care provider jointly approved by the employer and the employee. The third opinion will be considered final and binding. In addition, the employer may require the eligible employee obtain subsequent recertifications on a reasonable basis.

Finally, as a condition of restoration when the employee has taken leave because of his or her serious medical condition, the employer may have a policy that requires such employee to receive certification, from the employee's health care provider, that the employee is able to resume work. However, the FMLA also states that nothing in this part of the Act shall supersede a valid state or local law or a collective bargaining agreement that governs the return to work of employees. For example, a state law requiring food

service employees who have had hepatitis to get a special medical certification before returning to work would still be effective, regardless of whether the employer also required such certification. Similarly, a collective bargaining agreement that contained a procedure for reinstatement of employees on leave would remain in effect and not be superseded by this part of the Act.

If an employer provides paid leave for fewer than the twelve workweeks mandated by the FMLA, the additional weeks of leave necessary to attain the twelve workweeks of leave because of childbirth, placement, or to care for a child, spouse, or parent, the employee may elect, or the employer may require the employee, to substitute any accrued paid vacation leave, personal leave, or family leave. The term "family leave" means any paid leave provided by the employer covering the particular circumstances for which the employees seeking leave under this section. When the eligible employee takes leave to care for a child, spouse, or parent or when the employee is unable to perform the functions of his or her position, the employee may elect, or the employer may require the employee, to substitute any accrued paid vacation leave, personal leave, or medical or sick leave. However, nothing in the Act requires the employer to provide paid medical leave or paid sick leave in any situation in which the employer does not normally provide such leave.

The purpose of this part of the FMLA is to allow specified paid leaves which have accrued, but have not yet been taken, to be substituted for the unpaid leave under the Act in order to mitigate the financial impact of wage loss due to family and temporary medical leaves. In addition, this part prohibits the employer from substituting shorter periods of paid leave for the longer periods of unpaid leave provided by the Act. Therefore, this part of the FMLA assures that an employee is entitled to the benefits of applicable accrued paid leave, plus any remaining leave time made available by the Act on an unpaid basis.

An eligible employee taking leave under the FMLA is entitled to be restored to his or her previous position or to "an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment" upon

return from such leave. By allowing an employer to restore an employee to an "equivalent position," Congress recognized that it will not always be possible for an employer to restore an employee to his or her precise position held before taking leave. On the other hand, Congress also recognized that employees would be greatly deterred from taking leave without the assurance that upon return from leave they will be reinstated to at least an equivalent position.

However, the FMLA contains a limited exemption from the restoration requirement for key employees. To be considered a key employee, an employee must be a salaried employee and be among the highest paid ten percent of an employer's employees within seventy-five road miles of the facility at which the employee works. For such employees, restoration may be denied if: 1) such denial is necessary to prevent substantial and grievous economic injury to the operations of the employer, 2) the employer notifies the employee of its intent to deny restoration on such basis at the time the employer determines such injury would occur, and 3) in any case in which the leave has commenced, the employee elects not to return to employment after receiving such notice. Although there is no precise test to determine "substantial and grievous economic injury," one factor that should be considered is if the reinstatement of a key employee would threaten the economic viability of the organization. Minor inconveniences, however, would not be enough.

The FMLA requires an employer to maintain health insurance benefits under any single-employer or multi-employer group health plan, during any period that an eligible employee takes leave under the Act, at the level and under the condition coverage would have been provided if the employee had continued in employment continuously for the duration of such leave. The term "group health plan" means any plan of an employer, or plan contributed to by an employer, to provide health care to the employer's employees, former employees, or the families of such employees or former employees. However, nothing in this provision of the Act requires an employer to provide health benefits if it

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Statement on Human Rights

(The following Statement and Recommendations have been provided by the Feminist Jurisprudence Section of the Academy of Legal Studies in Business.)

As a result of the location of last year's Annual Meeting, an issue that was widely discussed at that meeting was discrimination against gay, lesbian and bisexual people. In the meeting of the Feminist Jurisprudence Section, we decided to develop a human rights statement that we would present to the Academy, for discussion at the 1994 Annual Meeting.

Various national professional associations have adopted statements of support for human rights, that include sexual orientation among the protected groups, including the following: the American Bar Association, the American Association of Law Schools, the American Psychiatric Association, the American Personnel and Guidance Association, the American Association of the Advancement of Science, the National Education Association, the American Public Health Association, the National Association of Social Workers, the American Library Association, the American Federation of Teachers, the American Psychological Association, and the National Council of Teachers of English. In addition, a variety of national religious groups have adopted such statements of support, including the National Council of Churches, the Protestant Episcopal Church in the U.S.A., the American Jewish Committee, the Central

Conference of American Rabbis, the Union of American Hebrew Congregations, the Lutheran Church of America, the National Federation of Priests' Councils, the Society of Friends, the Unitarian Universalist Association, the United Church of Christ, and the Presbyterian Church U.S.A. Most recently, in December 1993, the American Historical Association, the largest professional organization for historians with 16,000 individual members and 5,000 institutional members, adopted a human rights statement that includes sexual orientation.

The Academy of Legal Studies in Business should join these groups in expressing support for human rights and in condemning discrimination on the basis of status. In adopting such a statement we would be joining the above groups in their publicly expressed "commitment to the ideal of equal opportunity. [N]o person should be denied basic civil rights because of his or her status as a member of a minority group which is the victim of prejudice. Determinations can permissibly be made only on the basis of individualized facts, not on a set of presumptions arising from mere status." (American Bar Association, *Summary of Action of the House of Delegates*, 1989 Midyear Meeting, at 1.)

Recommendation No. 1

BEIT RESOLVED, that the Academy of Legal Studies in Business supports equality of opportunity for all persons in all

aspects of life, and abhors discrimination or segregation on the grounds of race, color, religion, national origin, gender, age, handicap or disability, affinity or sexual orientation (heterosexuality, bisexuality and homosexuality), creed, marital status, status with regard to public assistance, height, weight and veteran status.

Recommendation No. 2

BEIT RESOLVED, that the Academy of Legal Studies in Business will not schedule its annual meeting in any city or state that has laws prohibiting equal rights for people on the grounds of race, color, religion, national origin, gender, age, handicap or disability, affinity or sexual orientation (heterosexuality, bisexuality and homosexuality), creed, marital status, status with regard to public assistance, height, weight and veteran status.

Recommendation No. 3

BEIT RESOLVED, that the Academy of Legal Studies in Business will provide in all contracts entered into after the date this resolution has been adopted a clause that will allow it to escape without penalty from conference commitments in the event that the city or state in which the conference is scheduled adopts law(s) prohibiting equal rights for people on the grounds of race, color, religion, national origin, gender, age, handicap or disability, affinity or sexual orientation (heterosexuality, bisexuality

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FMLA (continued from page 3)

does not do so at the time the employee commences leave. But, if an employer establishes a health benefits plan during an employee's leave, the entitlement to health benefits would commence at the same point during the leave that the employee would have become entitled to such benefits if still on the job.

In the event an employee fails to return from leave, the employer may recover premiums paid to a single-employer or multi-employer group health plan during any period of unpaid leave under the Act provided two conditions are met:

1. The employee fails to return from leave

after the period of leave to which the employee is entitled has expired; and

2. The employee fails to return to work for a reason other than (a) the continuation, recurrence, or onset of a serious health condition that requires the employee to care for a child, spouse, or parent or prevents the employee from being able to perform the function of his or her position, or (b) other circumstances beyond the employee's control. However, an employer may not recapture health insurance premiums paid on behalf of a key employee who is denied restoration under the FMLA.

The FMLA accommodates the important societal interest in assisting families by establishing a minimum labor standard for leave. However, the Act specifically states that nothing in the FMLA "shall be construed to supersede any provision of a state or local law that provides greater family or medical leave rights than the rights established under this Act." Therefore, in states offering greater family and medical leave rights, employers would have to meet those requirements. But, in any state, employers may offer greater family and medical leave rights than are provided under the FMLA or state law.

RIGHTS (continued from page 4) and homosexuality), creed, marital status, status with regard to public assistance, height, weight and veteran status.

(The Feminist Jurisprudence Section hopes to obtain the support of the Employment Law Section. Please send any comments, thoughts, or suggestions to Deb Ballam, at College of Business, Ohio State University, 1775 College Road, Columbus, Ohio 43210-1399, or at: dballam@magnus.acs.ohio-state.edu)

The Employment and Labor Law Section Co-Chairs and Editors of this Newsletter wholeheartedly support the initiative of the Feminist Jurisprudence Section of the ALSB, in connection with its support for human rights and as represented in its statement. As much of our work in the area of employment and labor law emphasizes nondiscriminatory practices and equal opportunities, it would be inimical to the essence of our work to engage in or support any practice based on bias, prejudice or unwarranted judgment. To this end, we hope that the members of this Section consider the nature of the human rights resolutions and feel free to offer any expression of support or criticism to be published in the next issue of this Newsletter. The opinions expressed herein are those of the authors, and not necessarily of the members of this Section. We welcome a healthy debate on this topic and offer the Newsletter as a forum for discussion.

Laura Pincus
Dawn Bennett-Alexander
Roger Johns



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.

An Empirical Study of Workers' Compensation Claims Histories and Related Legal Issues

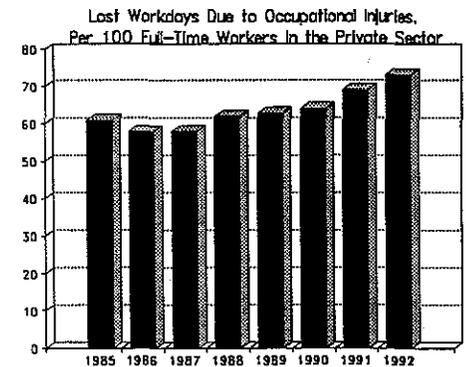
by
Ralph V. Switzer
Colorado State University

Most applicants for employment would be genuinely surprised if they realized how lax most employers are in reviewing job applications. Companies rarely verify information provided by applicants--information vital to properly matching prospective employees with appropriate jobs.

Recent surveys have shown that 18% of employers fail to check an applicant's employment history and 21% do not verify educational background. (*Lindquist-Endicott Report*, Northwestern University (1990)) In the past most companies required a pre-employment physical examination; now only 45% of employers do. (*Id.*) Of those companies which have eliminated physical examinations, 15% do not even bother to check the medical history information provided by the job applicant. (*Id.*) Nevertheless, personnel specialists claim that 90% of "hiring errors" would be eliminated with appropriate information verification. (*Id.*)

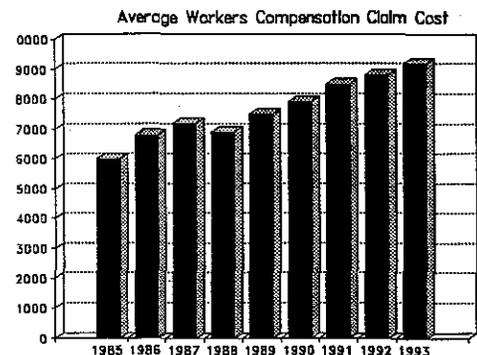
Pre-employment screening of applicants to determine their suitability to engage in certain work activities is a prudent and appropriate employer practice; and may be utilized while maintaining compliance with The Americans With Disabilities Act (ADA). (12 U.S.C. 12101, *et seq.*) This is especially important in work situations involving physical tasks such as lifting, pushing, and pulling, to determine if potential employees are capable of performing certain tasks. In other cases, prudent employers should consider, when it is lawful to do so, pre-screening applicants for jobs involving repetitive tasks to prevent work-related injuries associated with nervous system or visual impairments.

Private employers lost 76 workdays per 100 workers because of occupational injuries in 1992, up from 70 in 1991.



(Bureau of Labor Statistics (1990))

The average claim, meanwhile, rose to an estimated \$9,225 last year from \$8,811 in 1992.



(National Council on Compensation (1990))

Consequently, employers are seeking additional cost containment methods to reduce increasing workers' compensation rates. One approach to this problem involves the use of accident history data in the pre-employment screening of job applicants.

In this author's experience, workers' compensation has, historically, been one of the last places where employers and third parties begin to deploy cost

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WORKERS' (continued from page 5)

containment practices. This has been left almost exclusively to the attorneys and workers' compensation courts, while risk managers, benefits managers, third parties, and cost containment specialists have been excluded.

Risk managers can use data concerning actual injury histories to minimize the chance of hiring previously injured workers for jobs that could cause reinjury. Waste and fraud within the workers' compensation system will eventually erode benefits. Predictable political efforts to reduce premium costs will ultimately cause reduced entitlements.

For example, in the State of Colorado claims paid to injured workers actually decreased between 1986 and 1992 while premiums increased substantially. A recent study prepared for the State showed a 58% decrease in average compensation benefits paid to injured workers during the period. During the same time workers' compensation premiums increased over 103%. The report also shows that 18% of the cases involved reinjury of a previous injury. (Rocky Mountain News, March 12, 1991)

Just as a record of traffic violation can assist an insurer in rating a driver, the proper use of an employee's accident history can help an employer avoid the errors in job placement which lead to costly lost-time accidents and disabilities. For example, employers may be able to avoid required prolonged and heavy lifting by an individual who has prior back injuries.

Unfortunately, fraud has been suspected to play a role in a significant number of workers' compensation claims. It includes:

- Staying home "one more day,"
- Passing off a non-work, recreational injury as a work injury,
- An injury allowing time off for hunting season every year,
- Blatant patterns of "work two weeks, file, take six months off."

A workers' compensation "abuser" is one whose injury was premeditated. For certain types of injuries it is quite difficult to medically distinguish between symptom magnification and outright fraud, so this injured worker may cause frustration at several levels. Social factors are usually important with this type of injured

person. He may move rapidly from job to job; therefore, he is best discovered through historical information from pre-employment screening.

In this author's experience, proponents of pre-employment screening in such heavy industries as construction say that injury records can help employers judge if an applicant poses an unreasonable risk of liability. Given soaring costs for health care and workers' compensation insurance, companies cannot afford to hire workers who may be unfit or at high risk for accidents. Another concern is fraud--workers who jump from job to job, collecting money for hard-to-confirm injuries such as stress or back strain. (Wall Street Journal, July 16, 1990)

Accidents happen and accidents repeat themselves, so where do employers draw the line? Assuming that the employer deserves to deal with a known entity when considering an applicant for a specific job, then the employer deserves truthful answers to legally permissible questions regarding job-related illnesses and injuries. How else can that applicant be fairly placed so as not to be endangered or endanger others? No one is allowed to deny employment to an individual simply because of past claims. However, the employer retains a fundamental right to hire those who tell the truth and are able to perform essential functions of the job.

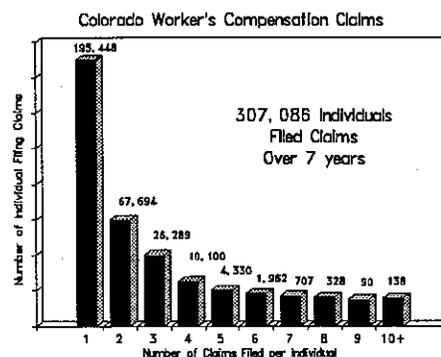
Given these profiles, justifiable reasons for an employer to seek valid historical injury data about potential employees are to (1) help match demands of the job to the capabilities of the worker, (2) reduce danger to the worker and other employees, and (3) identify fraudulent claimants.

At Colorado State University we evaluated, by computer, the entire database of lost-time workers' compensation claims filed within the last seven years in the State of Colorado. This was the first time data was compiled to identify the percentage of claimants with one to ten claims in the past seven years as well as the nature of those claims. This research forms a foundation to define a profile of a potential "abuser" of Workers' Compensation Insurance.

The hypothesis of the research was that background verification and pre-employment screening represents a

substantial economic interest nationwide due to the rapid increase in man-hour loss and insurance premiums. Verification of claims data by a prospective employer can minimize the incidence of fraud or misrepresentation. In so doing, the claims system will be better able to preserve the benefits for its intended recipients by eliminating waste and fraud.

We discovered that three or more claims were filed by over 14% of those filing in a seven-year period. A total of 5.8% filed four or more claims and 2.5% filed five or more times.



(With appreciation of assistance from David Neils, Hewlett-Packard)

The research further indicates that employers would be prudent to request specific information on employment forms about previous work-related injuries. Unfortunately, it is not uncommon for the same injured shoulder, the same injured knee, or more commonly, the same injured back to appear several times in different businesses, and to receive repeat compensation for a work-related injury.

Some thirty-nine states make public certain records of claims, lawsuits, and other injury-related matters. In some states all available information concerning work-related injuries is public record by virtue of specific statutes. Depending upon the specific jurisdiction, special circumstances may apply. For example, in several states the information is public only if litigation has become a factor in the disposition of the case (controverted cases). In other states the information becomes publicly available only when certain criteria, such as the number of lost workdays, has been exceeded.

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WORKERS' (continued from page 6)

While, to employers, it might seem "abusive" for an employee to file five or more claims within a seven-year period, the final determination as to whether this applicant should be denied employment must be based on factual circumstances, such as whether the applicant (1) can perform essential functions of the job, (2) has lied on the job application form, or (3) the applicant's competition for the job was better.

In compliance with the ADA, as well as other legislation, a private employer may ask questions regarding the applicant's ability to perform job-related activities which may reasonably relate to job performance. Only *after* a conditional job offer has been made to the applicant, may the employer legally investigate the truthfulness of the answers, by verification, using data from previously filed workers' compensation claims, along with job-related physical examinations (as long as all entering employees are given the exam and medical information obtained is kept confidential in separate medical files). (42 U.S.C. § 12112(c)(3)(A) and (B))

Although an employer may not ask the applicant questions specifically about a disability, an employer may inquire "into the ability of an applicant to perform job-related functions." (42 U.S.C. § 12112(c)(2)(B)) This technique is an

extension of the familiar "medical history" section of an employment application form. For example, an individual who refuses to allow an insurance company to research his prior health history generally cannot purchase life insurance from that company. A motor vehicle driving record is essential information to the company which issues automobile insurance, and an individual insured can neither prevent its release nor control its use. Injury records represent one of several means--including skills exams, drug tests, and credit checks--that are gaining in use as concern grows among companies about the health and integrity of their workers. (Wall Street Journal, July 16, 1990)

Several companies are collecting injury claims data nationwide and providing reports on workers' compensation claims histories and lawsuits filed by claimants. Avert, Inc., Fort Collins, Colorado, provides this information gathered from some forty states. It now has a database with over 7.5 million injury records and provides this information to over 4,000 companies which have verified pre-employment data on over 250,000 applicants in 1990.

The companies providing data are regulated under the same federal law that allows credit-reporting agencies to gather and sell personal financial information. That law demands that applicants be told

when they are rejected because of data in a consumer report.

Employers will discover that checking for past injury claims can be relatively inexpensive. The companies which provide this data typically charge \$5 or less per job applicant. Employers use these data to verify information on applications, to plan pre-employment physical examinations, and to match workers with the right jobs. For example, Hensel Phelps Construction Company, Greeley, Colorado, started checking applications against Avert's files two years ago as part of a screening program that includes special physical exams to test the strength of prospective workers. As a result, incidents of back strain have dropped 27%. (*Id.*)

Employers who want to know how their workers' compensation loss results compare with others in their state or nationally can compare their results with "Schedule Z" data available from the New York-based National Council on Compensation Insurance.

The NCCI charges for the information by the length of time it takes a computer to process the request. For example, workers' compensation loss data for all employee codes in a single state would cost a non-member about \$250, while member insurers would be charged \$150.

Letter from the Editors

Times are awfully hectic. The Midwest Academy just concluded its meeting, at which Laura acted as Program Chair and Dawn presented, but we wanted to make a few comments. As you may notice, the Employment and Labor Law Section (ELLS) Newsletter is coming along; this will constitute our longest issue yet, and we have received funding from Richard D. Irwin Publishing, Co. to ensure that production will continue. We have also added new sections, including our "Research Center," longer, more research-oriented articles, a catalog of other regional Academy meetings and the employment and labor related papers being presented there, and of course we will continue to bring you Roger Johns' exceptional review of recent developments in

our area. I don't know about you, but I rely on Roger's column for insight into employment and labor issues as they occur in the courts. Notwithstanding our ideas and progress on the Newsletter we would certainly appreciate any and all suggestions, input, feedback, and so on. This Newsletter is for you, the reader, and we would like to include all that you would like to read. In addition, we are ever present as an outlet for your not-yet-polished legal research pieces (long or short), or those shorter pieces that you are not sure what to do with. I think the three of us have fantasies about a standard review journal growing from this and any submissions would be welcome. Enjoy your spring!

Laura Pincus

Dawn Bennett-Alexander



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"Title VII Tennis," Anyone?

by

Jack A. Raisner
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Fast, name the groups protected by federal law from discrimination. If you must pause to think, imagine how much effort your students expend memorizing these classifications. Or how much you tax their patience when you continually refer to such "people in classifications protected by federal law."

Who are these people? We all know the colors of the light spectrum, thanks to a Mr. ROY G. BIV. Here is the mnemonic I use that helps students recall effortlessly the members of the federal discrimination rainbow.

Tell your students early on that the folk protected by federal anti-discrimination law "'R' OPRAH'S" people. Once you teach your students about "'R' OPRAH'S" people, they'll never forget them. Put the letters ROPRAHS vertically on the board. Do not write the names of the group yet. Elicit them from the class, which is now thinking hard to come up with them.

"'R' OPRAH'S" people:

- R - Race
- O - (national) Origin
- P - Pregnancy
- R - Religion
- A - Age
- H - Handicap (disability)
- S - Sex

Upon first hearing "'R' OPRAH'S," most students, of course, think of Oprah Winfrey. That is fine. She is a spectacularly successful member of at least two "'R' OPRAH'S" groups. Her guests, during any given week, will likely account for several more groups, as well. (Making this particular aside in class will usually engender a chuckle, but remind those who may smirk that, indeed, we are *all* "'R' OPRAH'S" people in one way or another!)

Most students can guess that "'R' OPRAH'S" includes race and religion. Some know age, sex and (national) origin. A few may know handicap. (Mention that

"disability" is now the preferred term). No one will recognize that pregnancy is part of Title VII -but then, you might explain, neither did the Supreme Court, when it forced Congress to enact the Pregnancy Discrimination Act of 1978.

As I go down the list, I explain how each group found its way onto the list. For instance, it is worth telling the revealing political yarn about how "sex" got on, as recounted by Ledvinka and Scarpello, in *Federal Regulation of Personnel and Human Resources Management*, at 63-65. I also set the basic parameters of each category. (Note: "color," for all practical purposes, falls within race, although there are instances of intra-racial color discrimination.)

Throughout the discrimination unit, my students and I refer to "'R' OPRAH'S" people scores of times. Everyone knows all of the groups on the exam. Years later, on the job, they recall "'R' OPRAH'S" with ease. I sleep better knowing that my students retain at least that much.

At a later point in the unit, I play Title VII tennis to reinforce and review the intentional discrimination burden-shifting framework under *McDonnell-Douglas* (and now, also, the Civil Rights Act 1991 "mixed-motives" framework).

To play a match of "Title VII Tennis," I announce a hypothetical fact pattern, then divide the classroom into "employees" on one side and "employers" on the other. I toss a tennis ball to the employees. The catcher must establish a *prima facie* case of intentional discrimination, based on the facts of the hypothetical case. This student then lobs the ball into the employers' court. The catcher there must articulate a defense, then send the ball back to the

employees for any pretext that can be asserted. Meanwhile I, or designated student "judges," examine the participants to clarify or challenge their respective positions.

To add another dimension, you can put the fact pattern in writing and give it to a "plaintiff-employee" on one side, and a "defendant-manager" on the other side. Do not reveal the facts to the class. The ball will be tossed between the respective human resources managers or "lawyers" on each side who will have to glean the facts from their clients, then seek to establish their respective burdens of proof.

At first, volley with a fact pattern that contains only circumstantial evidence raising a possible inference of discrimination. Make sure that the employer's justifications for the adverse treatment contain both pretextual and non-pretextual reasons. Then add to the facts some direct evidence of possible overt discrimination (i.e., biased statements). That should trigger the mixed-motives analysis and shift the burdens anew.

To illustrate disparate impact, pepper the evidence with statistics and general employment practices and policies, and send the ball flying.

Once you find a fact pattern that reaches a "hot" level of participation, you might set up a mock mediation in class. If this is done properly, your students will see how the use of a good mediator, shuttling between the parties, may be a more sensible way to resolve the dispute than lofting ineffable burden-of-proof "tennis balls" along the dizzying heights of the Title VII frameworks. Still, those burdens of proof are worth knowing. Unless our students know Title VII's metes and bounds, they are going to look clumsy when they step onto the "court" in real life and find it is not just a game.

CORPORATE SPONSORSHIP FOR NEWSLETTER: The *Richard D. Irwin Publishing Co.* has made a commitment to the Employment and Labor Law Section to underwrite a significant part of the cost of publishing this Newsletter for the next two years. This additional funding will play an important part in the continued growth and development of the Newsletter. On behalf of the members of the Section, the editors of the Newsletter thank both the *Richard D. Irwin Publishing Co.*, for their vote of confidence in our endeavor, and Craig Beytien of *Irwin*, who was instrumental in arranging this funding. The editors also thank *Eastern New Mexico University*, and its College of Business for providing the initial funding which has made the Newsletter, in its current form, a possibility.

Recent Developments in Employment and Labor Law

by

Roger J. Johns

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■ EMPLOYMENT DISCRIMINATION LAW Reverse Discrimination

In *Harding v. Gray*, 9 F.3d 150 (D.C. Cir. 1993), the District of Columbia Circuit illuminated its definition of the "background circumstances" which must be alleged in order to state a prima facie case of reverse race discrimination. Twelve years earlier, in *Parker v. Baltimore & Ohio R.R. Co.*, 652 F.2d 1012 (D.C. Cir. 1981) the court had specified that in cases where a white plaintiff alleges reverse, race discrimination, the elements of a prima facie case are slightly different than they would be if the plaintiff belonged to a racial minority. In an ordinary race discrimination case the plaintiff must prove "(i) that he belongs to a racial minority," as is ordinarily the case; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. (*McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) In cases involving white plaintiffs, the court in *Parker*, substituted "background circumstances [that] support the suspicion that the defendant is that unusual employer who discriminates against the majority." (*Parker* at 1017, emphasis added), for the first element of the prima facie case as specified in *McDonnell Douglas*.

In *Harding*, the court notes that these background circumstances can be divided into two categories: "(1) evidence indicating that the particular employer at issue has some reason or inclination to discriminate invidiously against whites; and (2) evidence indicating that there is something 'fishy' about the facts of the case at hand that raises an inference of discrimination." (*Harding*, at 153) The court goes on to hold that, in some instances, background circumstances of the second type, by themselves, create a prima facie case. Based on its belief that rational employers

will always prefer the better qualified individual, the court stated that proof of superior qualifications is the kind of type-two circumstance that will suffice as a prima facie case, on its own. Then, following the guidance of *Texas Dept. of Community Affairs v. Burdine* (450 U.S. 248 (1981)), that the point of proving a prima facie case is to prove circumstances which give rise to an inference of discrimination, the court in *Harding*, held that "[a]bsent a legitimate reason for the employer's action, then, such an irrational promotion raises an inference of discrimination against the better-qualified non-minority applicant." (*Harding* at 154)

In another case, *McNabola v. Chicago Transit Authority*, 10 F.3d 501 (7th Cir. 1993), the Seventh Circuit addressed the issue of reverse discrimination in the context of an independent contractor, doing work for a public employer. McNabola, a white male, was eliminated as a physician independent contractor for the Chicago Transit Authority (the CTA), by CTA's general attorney, a black woman. Since CTA is a public employer and since McNabola was an independent contractor for, not an employee of, CTA he sued for deprivation of his civil rights under 42 U.S.C. § 1983. This opinion provides a good primer on the law governing when liability for the acts of its employees can be imputed to a municipality, under § 1983 (*McNabola* at 509-12), and the elements of a prima facie case under § 1983 (*Id.* at 513). While the case does not break new ground, it does apply the recently decided *St. Mary's Honor Center v. Hicks* (113 S.Ct. 2742 (1993)) to the steps in the *McDonnell Douglas* framework for indirect proof of discrimination.

The Expanding Duty to Accommodate Under the Rehabilitation Act of 1973

Two recent cases have expanded an employer's duty, under the Rehabilitation Act of 1973, to accommodate an employee's handicap, beyond accommodations reasonably necessary to enable the

employee to perform his or her job. In *Buckingham v. U.S.*, 998 F.3d 735 (9th Cir. 1993), the plaintiff sued, among others, the United States Postal Service, for failing to transfer him to a position in a locale where he would be better able to receive treatment for AIDS. The Postal Service had denied the requested transfer on the grounds that the transfer would violate a Memorandum of Understanding (MOU) entered into pursuant to a collective bargaining agreement in effect between the Postal Service and the unions representing its workers. In finding that the Postal Service had violated the Rehabilitation Act, the Ninth Circuit held that "... employers are not relieved of their duty to accommodate when employees are already able to perform the essential functions of the job. Qualified handicapped employees who can perform all job functions may require reasonable accommodation to allow them to . . . enjoy the privileges and benefits of employment equal to those enjoyed by non-handicapped employees. In other words, an employer is obligated not to interfere, either through action or inaction, with a handicapped employee's efforts to pursue a normal life." *Id.* at 740. The court also found that the requested transfer would not have been violative of the MOU.

In the earlier case, *McWright v. Alexander*, 982 F.2d 222 (7th Cir. 1992), the plaintiff, McWright was unable to bear children, so she and her husband applied to become adoptive parents. The personal leave options made available to McWright were significantly more onerous than those made available to women able to bear children, and failed to take into account the timing uncertainties inherent in the adoption process. The leave arrangements were, in fact, so onerous that McWright ultimately resigned. She subsequently sued her employer, the Department of Education (DOE), under sections 501 and 504 of the Rehabilitation Act, alleging that because she was treated differently than

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biological mothers requesting leave, the DOE had discriminated against her on the basis of her handicap (her inability to bear children) and had failed to reasonably accommodate her handicap. The trial court dismissed her claim, but the appellate court reversed, holding that "[t]he Rehabilitation Act [of 1973] calls for reasonable accommodations that permit handicapped individuals to lead normal lives, not merely accommodations that facilitate the performance of specific employment tasks."

These interpretations of the Act significantly alter the scope of the duty of employers subject to the Rehabilitation Act. At least in the Seventh and Ninth Circuits, the mere fact of employment now gives rise to a duty to facilitate a certain level of non-work-related lifestyle for disabled persons. The language of the courts is so broad that a disability which does not interfere with an employee's ability to perform the essential functions of the job, but does interfere with an employee's ability to live a normal life, as was the case in both *Buckingham* and *McWright*, would have to be accommodated. Buckingham's condition did not affect his ability to work. However, the denial of certain working conditions did interfere with his ability to obtain treatment for his condition. And, in *McWright*'s case, personal leave options did not interfere with her ability to work. Rather, they interfered with her ability to properly care for her newly adopted baby. In both cases, the courts reached a just result, but they did so with an unnecessary expansion of the employer's duty. *Buckingham* could have been resolved purely on contractual grounds, since both the district court and the appellate court found that the requested transfer did not violate the MOU, and was otherwise proper. The court in *McWright* could have simply applied the DOE's own personnel regulations regarding evenhandedness in the imposition of job conditions.

Sexual Harassment

Two important decisions dealing with hostile work environment sexual harassment have been handed down in the last few months. In the first case, *Harris v. Forklift Systems, Inc.*, 114 S.Ct. 367 (1993), decided on November 9, 1993, the Su-

preme Court held that "so long as the environment would reasonably be perceived, and is perceived, as hostile or abusive, . . . , there is no need for it also to be psychologically injurious. *Id.* at ____." According to the magistrate's report (*Harris v. Forklift Systems*, No. 3:89-0557 (M.D.Tenn. Nov. 27, 1990, App. to Pet. for Cert. A-5 to A-25), which was summarily adopted, in unpublished opinions, by both the district court (*Id.* at A-4) and the Sixth Circuit (*Harris v. Forklift Systems*, Nos. 91-5301, 91-5871, 91-5822 (6th Cir. Nov. 17, 1992, App. to Pet. for Cert. at A-1), the plaintiff in *Harris* had been "the object of a continuing pattern of sex-based derogatory conduct" (*Id.* at A-8) committed by "a vulgar man [who] demeans the female employees at his workplace[.]" (*Id.* at A-14). The Magistrate also found that some of the defendant's conduct was offensive to the plaintiff and would have offended a reasonable woman. *Id.* at A-19. Nevertheless, under the standard then in force in the Sixth Circuit, a plaintiff was required to prove, among other things, that she suffered psychological injury as a result of the complained of behavior. (*Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 619-20 (6th Cir. 1986)) The Supreme Court eliminated this requirement and, instead, reaffirmed the standard it announced in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).

The second case, *Karibian v. Columbia University* (Docket No. 93-7188), handed down by the Second Circuit, on January 25, 1994, applied a new standard to determine when an employer can be held liable for the creation of a sexually hostile workplace, by one of its supervisors. The court observed that "[w]hereas liability for *quid pro quo* harassment is always imputed to the employer, a plaintiff seeking to establish harassment under a hostile environment theory must demonstrate some *specific basis* to hold the employer liable for the misconduct of its employees." (*Id.* at 14, second emphasis added) After noting that employers will not always be liable for hostile work environments created by their employees, and that neither the existence of a complaint procedure nor a lack of notice as to the situation will automatically protect an employer (See *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 72

(1986), the court went on to furnish the rudiments of a technique for determining what constitutes such a "specific basis." In what appears to be a significant departure from current understanding of the law in this area, the court, relying on the principles of agency law, held that: "[A]n employer is liable for the discriminatorily abusive work environment created by a supervisor if the supervisor uses his actual or apparent authority to further the harassment, or if he was otherwise aided in accomplishing the harassment by the existence of the agency relationship. In contrast, where a low-level supervisor does not rely on his supervisory authority to carry out the harassment, the situation will generally be indistinguishable from cases in which the harassment is perpetrated by the plaintiff's coworkers [in which case] the employer will not be liable unless 'the employer either provided no reasonable avenue for complaint or knew of the harassment but did nothing about it.'" (*Karibian*, at 16-7 (quoting from *Kotcher v. Rosa & Sullivan Appliance Center, Inc.*, 957 F.2d 59 (2d Cir. 1992)) While this is a useful principle, the court, unfortunately, did not elaborate on when a supervisor will be considered to have "use[d] his actual or apparent authority to further the harassment" (*Id.*) nor did it provide guidance on how to distinguish between the different supervisory levels to which the holding refers and to which it applies different standards.

In its summary of the facts, the Second Circuit noted that Mark Urban (the individual accused of harassment in this case), a Columbia employee, had supervisory authority over Karibian since he could "alter[her] work schedule and assignments, and . . . give her promotions and raises . . . and had at least the apparent authority to fire [her]." (*Karibian*, at 4.) Karibian, a Columbia student worked for Telefund, which was administered by an independent contractor, but "operated under the aegis of the Columbia's 'University Development and Alumni Relations Office'" (UDAR). (*Id.*) Urban had been appointed by Columbia to the position of Development Officer for Annual Giving for the University Development and Alumni Relations Office, in which position, he had supervisory authority over Telefund.

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(Ed. Notes: All page numbers noted herein, for *Karibian*, are the page numbers of the opinion as downloaded from the Second Circuit's EDOS electronic bulletin board. These page numbers will not correspond to the page numbers in the slip opinion or the reported decision. A full article on *Karibian*, by Jack Raisner of St. John's University, will appear in the forthcoming issue (Vol.2, No.1) of this Newsletter.)

Two other cases involving sex discrimination are noteworthy. In *Cosgrove v. Sears, Roebuck & Co.*, 9 F.3d 1033 (2d Cir. 1993), the Second Circuit retroactively applied the holding of *St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742 (1993), which states that a rejection of an employer's reason for its actions does not necessarily entitle the plaintiff to judgment as a matter of law, to employer behavior that occurred nearly sixteen years before *Hicks* was decided. The court relied upon *Harper v. Virginia Dept. of Taxation*, 113 S.Ct. 2510 (1993) for its authority to apply *Hicks* retroactively. *Hicks* was a race discrimination case, but its holding is widely believed to apply to all discrimination cases in which the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) analysis applies.

The other case, *Saxton v. American Tel. & Tel. Co.*, 10 F.3d 526 (7th Cir. 1993) is an early example of the effects of *Harris v. Forklift Systems, Inc.*, 114 S.Ct. 367 (1993). In *Saxton*, the Seventh Circuit repudiated the standard in its pre-*Harris* line of cases, which required a plaintiff, in a sexual harassment case, to prove that the complained of behavior "cause[d] such anxiety and debilitation to the plaintiff that working conditions were poisoned" (quoting *Scott v. Sears, Roebuck & Co.*, 798 F.2d 210, 213 (7th Cir. 1986)). The Supreme Court, in *Harris*, held that a plaintiff need not prove psychological injury in order to prove harassment. Apparently, the Seventh Circuit equated its standard, as enunciated in *Scott*, and other cases, as equivalent to the "psychological injury" standard rejected by *Harris*. Also, in *Saxton*, the court evaluated the complained of behavior from the point of view of a "reasonable person" (*Saxton* at 534), as opposed to the viewpoint of a reasonable woman. Although the court states that it is "not called upon to decide . . . whether it

might be more appropriate to evaluate the plaintiff's work environment from the perspective of a reasonable woman as opposed to a genderless reasonable person" (*Id.* at n. 13), it appears to adopt the reasonable person standard anyway.

National Origin Discrimination

In *Boutros v. Canton Rapid Transit Authority*, 997 F.2d 198 (6th Cir. 1993), the Sixth Circuit has, for the first time, applied 42 U.S.C. § 1983 to claims of national origin discrimination. This is not surprising since the Sixth Circuit had previously held that Title VII and § 1983 applied equally to other protected traits enumerated in Title VII. (*Risinger v. Ohio Bureau of Workers' Compensation*, 883 F.2d 475 (6th Cir. 1989) (applying Title VII and § 1983 to a claim of a racially hostile workplace) and *Rabidue v. Osceola Refining Co.*, 805 F.2d 611 (6th Cir. 1986) (applying Title VII and § 1983 to a claim of sexually hostile workplace)). Other circuits have also found that since Title VII and § 1983 provide parallel remedies, allegations and evidence sufficient to establish and prove a claim under Title VII are sufficient to establish and prove a claim under § 1983. (See *Hamilton v. Rogers*, 791 F.2d 439 (5th Cir. 1986); *Alexander v. Chicago Park District*, 773 F.2d 850 (7th Cir. 1985); *Carrion v. Yeshiva University*, 535 F.2d 722 (2d Cir. 1976) and,

Retroactivity of the ADA

With a brief, per curiam opinion, the Fifth Circuit held that "the [Americans With Disabilities Act of 1990] is not to be given retroactive effect." *O'Bryant v. Midland*, 9 F.3d 421, 422 (5th Cir. 1993). Although the opinion contains virtually no analysis of the issue, the court indicates that its decision is based upon the fact that Section 108 specifies that the act becomes effective twenty-four months after the date of enactment. The court ignores, however, any distinction between the Act's effective date and the Act's effect. Stated differently, a designation of the point in time at which an act becomes effective is different than a designation of which activities, once the act is effective, will be subject to the Act's effects. The fact that a piece of legislation specifies the time at which its effects will be felt does not preclude a finding that one of its effects is the

regulation of activities occurring prior to the date of effectiveness. Congress has the power to specify that its Acts will apply retroactively, to activities occurring before an Act's effective date. Inclusion of an effectiveness date is not such a specification. The inclusion of effectiveness dates in the Civil Rights Act of 1991 (§§ 402(a)-(b), 109(c), and 110(b)) has not prevented the circuits from splitting over whether it is to be given retroactive effect. (Compare *Landgraf v. USI Film Products*, 968 F.2d 427 (5th Cir. 1992) and *Rivers v. Roadway Express*, 973 F.2d 490 (6th Cir. 1992)), decisions in both of which are pending from the U.S. Supreme Court on the issue of the retroactivity of the Civil Rights Act of 1991 with *Estate of Reynolds v. Martin*, No.91-15237, 1993 WL 27657 (9th Cir. Feb. 9, 1993).

The federal district court for the Northern District of California, in *Ray v. Maryatt Industries*, 829 F.Supp. 1169 (N.D.Cal.1993) has also declined to apply the ADA retroactively, relying on the delayed effective dates in the Act, as evidence of Congress' intent that the Act apply prospectively only.

LABOR LAW Employee Privacy

The U.S. Supreme Court has decided that unions representing federal employees, have no right to obtain the names and home addresses of non-union, agency employees, in the bargaining unit, unless such information would significantly contribute to "public understanding of the operation or activities of the government" (*Department of Defense v. Federal Labor Relations Authority*, No. 92-1223, HERMES 503, 504 and 505 (U.S. Feb. 23, 1994) (quoting *Department of Justice v. Reporters Committee for Freedom of Press*, 489 U.S. 749 (1989)). In arriving at its decision, the Court weighed "the public interest in effective collective bargaining embodied in the [Federal Service Labor-Management Relations] Statute (the "Labor Statute"), 5 U.S.C. 7101-7135 (1988 and Supp. IV 1992) against the employee's interest in freedom from disclosures which, under the Privacy Act of 1974 (the "Privacy Act"), "would constitute a clearly unwarranted invasion

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of personal privacy." (5 U.S.C. 552(b)(6))

The Labor Statute requires an agency to "furnish to the exclusive bargaining representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data . . . which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining." (5 U.S.C. 7114(b)(4)(B)) On the other hand, the Privacy Act provides that "no agency shall disclose any record which is contained in a system of records by any means of communication to any person . . . unless disclosure of the records would be . . . required under section 552 of [the Freedom of Information Act (the "FOIA")]." (5 U.S.C. 552a(b)(2) (1988 and Supp. IV 1992) In balancing the competing dictates of these two statutes, the Court reasoned that if disclosure is not required under the FOIA, then it is prohibited by law. The Court had previously interpreted the FOIA to embody "a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." (*Department of Air Force v. Rose*, 425 U.S. 352, 360-61 (1976)) Relying on its earlier decision, in *Reporters Committee*, the Court reaffirmed its commitment to the principle that in deciding whether information is exempt from mandatory disclosure under the FOIA, courts must "balance the public interest in disclosure against the interest Congress intended . . . to protect." (*Reporters Committee*, at 776). It further relied on *Reporters Committee* for the proposition that the only public interest relevant to this weighing process is "the extent to which disclosure would serve the 'core purposes of the FOIA,' which is contribut[ing] significantly to public understanding of the operations or activities of the government." (*FLRA*, at *4, quoting *Reporters Committee*)

The Court characterized the union's interest ("[d]isclosure . . . might allow the unions to communicate more effectively with employees") as "negligible, at best," since it would not contribute to an understanding of the operation of the government. On the other hand, the Court found that, the non-union employees' decision not to reveal their addresses to the

union implicated a privacy interest sufficient to outweigh any disclosure interest on the part of the union.

Union Organizer Access to Employer's Premises

What the Supreme Court may have taken from unions, in *Department of Defense, supra*, it gave back, in two other recent opinions. In the first case, *Thunder Basin Coal Co. v. Reich*, No. 92-896, HERMES_ (U.S. Jan 19, 1994), the Court held that the statutory-review scheme created by the Federal Mine Safety and Health Amendments of 1977 (30 U.S.C. 801, *et seq.*) (1988 & Supp. IV 1992) (the Act) deprives federal district courts of subject-matter jurisdiction over pre-enforcement challenges to the Act.

Under the Act, the miners have the authority to appoint a representative to accompany the Secretary of Labor on his periodic, unannounced safety inspections, and they have the right to have the mine operator post, at the mine, certain information about miner's representative. The miners at Thunder Basin designated employees of the United Mine Workers, who were not, themselves, employees of Thunder Basin. The mine operator refused to post information about the representatives and asked the district court to enjoin the Mine Safety and Health Administration (MSHA) from enforcement of the posting and access requirement in the Act, before MSHA had even attempted enforcement. The operator was concerned that if it was required to allow UMW employees, who are not also mine employees, on the mine premises, its right, under Section 8(a)(1) of the National Labor Relations Act (the NLRA), to exclude non-employee union organizers from its property would be lost. The district court issued the injunction, but was reversed by the Tenth Circuit. The Supreme Court upheld the appellate court.

Even though its holding will have the effect of allowing non-employee union organizers to have access to mine premises, pending the statutorily mandated administrative and appellate court disposition of the operator's concerns, the Court held that the issue raised by the mine operator is the kind of issue Congress intended to be handled under the administrative statutory-review scheme created by

the Act and that there is no provision for district court intervention. In so ruling, the Court has created, in addition to the so-called *Babcock* exception, a new, albeit narrow, avenue by which non-employee union organizers can gain access to an employers property for organizational activities. In *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956), the Court recognized that, even though Section 8(a)(1) of the National Labor Relations Act (the Act) allows employers to exclude non-employee union organizers from its premises, in certain instances, under Section 7 of the Act, an employer's right to exclude must give way to the rights of employees to organize, even if it means allowing non-employee union organizers onto the employer's premises.

The Court, in *Thunder Basin*, declined to address the issue of whether denial of the injunction would cause irreparable harm to the mine operator. The net effect of the ruling is that mine operator's statutory rights under Section 8(a)(1) have been subordinated to miners' rights under the Federal Mine Safety and Health Amendments Act of 1977.

Reinstatement

In the second case, *ABF Freight System, Inc. v. National Labor Relations Board*, No. 92-1550, HERMES_ (U.S. Jan. 24, 1994), the Court held that the NLRB may, but is not required to, adopt a flat rule precluding reinstatement of an employee, when the employee is found to have lied under oath in a formal proceeding, before an ALJ. The employee involved in this case, Michael Manso, had been terminated by ABF Freight, on three different occasions. There was considerable evidence that his terminations were the result of anti-union bias. The third termination was based on a retroactive application of a newly announced tardiness policy. Manso was terminated for twice being late to work, in violation of a newly created anti-tardiness policy instituted by ABF. The excuse Manso offered for this second infraction was immediately investigated by ABF and turned out to be a lie. During a hearing on an unfair labor practice charge, filed by Manso, arising out of his third termination,

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Manso repeated the lie, while under oath. The NLRB, nevertheless, ordered Manso reinstated, for two reasons. First, the Board determined that the retroactive manner in which the anti-tardiness policy had been enforced in Manso's case was a pretext for ABF's anti-union bias, and therefore, unlawful. Second, the Board found that, since Manso's termination was based on the unlawful tardiness policy, not on his dishonesty, his termination was not "for cause." While the members of the Court, in the main opinion and in two concurrences, found Manso's behavior repugnant, the Court recognized that Congress had delegated primary responsibility for effectuating the policies of the National Labor Relations Act to the NLRB and that the NLRB's discretion in awarding reinstatement is restricted only in cases where the employee was discharged for cause. In instances where the employee was discharged without cause, the NLRB is free to award reinstatement. Accordingly, the Court upheld the reinstatement (with back pay), while lamenting the fact that its decision rewarded dishonesty.

Employment and Labor Law Section Newsletter

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The Research Center

In an effort to develop a greater awareness of and access to legislative and scholarly developments in the field of employment and labor law, this section of the Newsletter provides listings and locations for the most recently published scholarly journal articles, conference papers and the most recently introduced federal legislation. It is the hope of the Editors of this Newsletter, that this information will inspire and facilitate research and writing in the area of employment and labor law.

CONFERENCE PAPERS

This Newsletter provides the only widely-distributed, comprehensive listing of the scholarly papers on employment and labor law presented at the regional meetings of Academy of Legal Studies in Business.

The Southern Academy of Legal Studies in Business held its annual meeting in conjunction with the annual meeting of the Southwestern Federation of Administrative Disciplines, in Dallas, Texas, March 2-5, 1994. The following papers, dealing with employment and labor law issues were presented at the meeting:

- Employer and Consumer Rights re Drug Testing in the Workplace*, Joe G. Chaney, Jr., Murray State University
- Financial Exigency v. Tenure Rights*, Joe G. Chaney, Jr., Murray State University
- Whistleblowers: Is the Law Dealing Effectively With the Ethical Issues?*, John Houlihan, University of South Maine
- Permissible Pre-Employment Inquiries: A Legal Primer*, Brenda E. Knowles, Indiana University, South Bend
- Stress and Sexual Harassment: Emerging Trends In How Courts Are Applying Agency Principles*, Christine W. Lewis and Jane R. Goodson, Auburn University, Montgomery
- The Tort of Outrage in Alabama: Emerging Trends in Sexual Harassment*, Christine W. Lewis and Jane R. Goodson, Auburn University, Montgomery, Renee D. Culverhouse, Alabama Department of Postsecondary Education
- Employer Beware: Truth in Hiring May Be the New Standard in Recruiting*, Amy Laura Oakes and Larry Clark, Louisiana State University, Shreveport
- Employee Participation Programs: Is There A Future?*, Stephen D. Owens and James R. McLaurin, Western Carolina University
- How Arbitrators Address Sexual Harassment Cases*, Stephen D. Owens and James R. McLaurin, Western Carolina University
- Hostile Environment Harassment: Why Is Sexual Harassment Treated Differently?*, Ramona L. Paetzold, Anne M. O'Leary-Kelly and Amy Hillman, Texas A & M University
- Employer Liability in Partner Selection in Public Accounting Firms: The Impact of the Mixed Motive Provisions of the Civil Rights Act of 1991*, Robert K. Robinson, Dave L. Nichols and Brian J. Reithel, University of Mississippi
- Federal Regulation of the Employer-Employee Relationship*, Charles R.B. Stowe and Keith Jenkins, Sam Houston State University
- Are the Doors Closed? Minority Representation in Major Law Firms*, Levon Wilson, James R. McLaurin and James W. Pearce, Western Carolina University
- To Be, or Not To Be: When a Student-Athlete Becomes an "Employee" of the University*, LeVon E. Wilson and Swati Patil, Western Carolina University

CURRENT LAW REVIEW ARTICLES

The following is a partial listing of the scholarly articles dealing with employment and labor law issues which have appeared in print, during the last few months. Future editions of this Newsletter will provide a listing of the articles published since the date upon which the following list was compiled.

New Continuity Regulations Issued, 16(1) INDUS. REL. L. BULL. 438 (Oct 15, 1993)
Continued on page 14

Research Center *(continued from page 13)*

- Iglesias, Elizabeth M., *Structures of Subordination: Women of Color At the Intersection of Title VII and the NLRA. Not! (Employment Discrimination Component of the 1964 Civil Rights Act, National Labor Relations Act) (In Your Midst: Contributions of Women of Color in the Law)*, 28 HARV. C.R.-C.L. L. R. 395-503 (Summer 1993)
- Piskorski, Thomas J., *Reinstatement of the Sexual Harasser: The Conflict Between Federal Labor Law and Title VII*, 18 EMP. REL. L.J. 617-623 (Spring 1993)
- McGuinness, Jeffrey C., *Outdated Laws Govern Modern Workplaces: New Work Practices Challenge Legal Relics*, 16 NAT'L L.J. S14 n.13 (Nov 29, 1993)
- Dannin, Ellen I., *Labor Law Reform - Is There a Baby in the Bathwater?*, 44 LAB. L.J. 626-631 n.10 (Oct 1993)
- Furfaro, John P. and Josephson, Maury B., *Total Quality Management and the Law*, 210 N.Y.L.J. 3 n.89 (Nov 5, 1993)
- Samborn, Randall, *Labor Section Strife Hits ABA: Plaintiffs' Bar Walkout?* 16 NAT'L L.J. 3 n.9 (Nov 1, 1993)
- Schwab, Stewart J., *Life-cycle Justice: Accommodating Just Cause and Employment At Will*, 92 MICH. L. REV. 8-62 n.1 (Oct 1993)
- Laurie, A., *When Can An Employee Be Discharged? Ask the Legislature*, 25 PAC. L.J. 107-156 n.1 (Oct 1993)
- Aquino, Jorge, *Plaintiffs' Lawyers Give Up On ABA Labor Section: Seeking New Influence*, 16 LEGAL TIMES 12 n.20 (Oct 4, 1993)
- Zatz, Marjorie S., *Mexican Labor and World War II: Braceors in the Pacific Northwest*, 27 LAW & SOC'Y REV. 851-863 n.4 (Nov 1993)
- Patrick, Michael D., *Lawful Residence Through Employment*, 210 N.Y.L.J. 3 n.103 (Nov 29, 1993)
- Rock, Edward B. & Wachter, Michael L., *Labor Law Successorship: A Corporate Law Approach*, 92 MICH. L. REV. 203-260 n.2 (Nov 1993)
- Harris, Brian R., *Workers Can't Appeal Seasonal Designation: Unemployment Compensation Hearings Proper Forum Pennsylvania Supreme Court Rules*, 16 PA. L.J. 8 n.46 (Dec 6, 1993)
- Waks, Jay W. & Brewster, Christopher R., *NAFTA Vote Ignites Plant-Closing Bills*, 16 NAT'L L.J. 18 n.15 (Dec 13, 1993)
- Martin, Christopher J., *The NAFTA Debate: Are Concerns About U.S. Job Migration to Mexico Legitimate?*, 19 EMP. REL. L.J. 239-250 n.3 (Winter 1993)
- Shusterman, Carl & Neal, David, *Recruiting International Talent*, 16 L.A. LAW. 35(4) n.8 (Nov 1993)
- Marcus, Eric H., *Sexual Harassment Claims: Who Is A Reasonable Woman?*, 44 LAB. L.J. 646-650 n.10 (Oct 1993)
- Orkin, Neal & Halvorsen, Michael, *There Is No Honor in Honoring A Picket Line* 44 LAB. L.J. 639-645 n.10 (Oct 1993)
- Terpstra, David E., *The Process and Outcomes of Sexual Harassment Claims*, 44 LAB. L.J. 632-638 n.10 (Oct 1993)
- Meyer, Richard S., *Common Causes and Special Causes: Who Is Threatened By Deming-Labor or Management?*, 44 LAB. L.J. 620-625 n.10 (Oct 1993)
- Turner, Ronald, *Affirmative Action and the Civil Rights Act of 1991*, 44 LAB. L.J. 615-619 n.10 (Oct 1993)
- Veglahn, Peter A., *Key Issues In Performance Appraisal Challenges: Evidence From Court and Arbitration Decisions*, 44 LAB. L.J. 595-606 n.10 (Oct 1993)
- Friedman, Wilbur H., Jr., *The NLRB Suffers Institutional Amnesia: the Paramax Decision*, 44 LAB. L.J. 651-653 N.10 (Oct 1993)
- Mertens Impedes Labor Department Enforcement Effort* 21 TAX MGMT. COMPENS. PLAN. J. 259-260 n.10
- Coyle, Marcia & MacLachlan, Claudia, *Labor Secretary Voids Whistleblower Accord*, 16

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Announcements

Panel Presentation

The *Journal of Legal Studies Education* is sponsoring, with the Employment and Labor Law Section, a panel presentation of pedagogical issues and ideas in employment law. If you have an innovative pedagogical approach or would like to discuss ideas you have, we would certainly like to talk to you about them. Please contact Laura Pincus at (312) 362-6569 or lpincus@wppost.depaul.edu

From Laura Pincus

I am going to be conducting research on international privacy rights this summer, for a paper with Roger Johns. My research will take me overseas to a number of different countries. I would appreciate any information about these places from people who have been there. Contacts (personal or academic) would be great, since I'll be travelling alone and would love to see the real non-touristy things. In addition, I would like to meet with human resource managers in each of the countries and, while I have made some contacts, any help would be greatly appreciated. Planned stops: Tahiti, Auckland, Melbourne, Singapore, Bangkok, Katmandu and Delhi. Thanks so much for your help. I can be reached at (312) 362-6569 or lpincus@wppost.depaul.edu.

E-mail Directory

The response to the call for E-Mail addresses is encouraging. Compilation of an E-mail directory for the Employment and Labor Law Section is an ongoing process, so submission of addresses is still encouraged. If you wish to be included in the directory, please send your E-mail address to Roger Johns at Eastern New Mexico University, johnsr@email.enmu.edu. Indicate whether the address is an Internet or a Bitnet address (or both).

Research Center *(continued from page 14)*

- NAT'L L.J. 5 n9 (Nov 1, 1993)
 Mota, Sue Ganske, *Work For Hire Revisited: Aymes v. Bonelli*, 12 COMPUTER/L.J. 7-24 n.1 (Oct 1993)
 Claps, Thomas E., *Labor Law Arbitration Awards (Survey of Recent Developments in Third Circuit Law)*, SETON HALL L. REV. 24 n1 541-546 Winter, 1993
 Smith, Rebecca, *Labor Law - Burden of Proof (Survey of Recent Developments in Third Circuit Law)*, 24 SETON HALL L. REV. 536-541 N.1 (Winter 1993)
 Carton, Christopher R., *ERISA Preemption: A State Law Does Not "Relate to" ERISA Plans and is Therefore Not Preempted by ERISA (Survey of Recent Developments in Third Circuit Law)*, 24 SETON HALL L. REV. 523-532 n.1 (Winter 1993)
 Fernandes, Maria, *Business Migration: New Changes*, 137 SOLIC. J. 967(2) N.37 (Oct 1, 1993)
 Mailman, Stanley, *The Difficulties in Compliance (The Immigration Act of 1990)*, 210 N.Y.L.J. 3 n.80 (Oct 25, 1993)
 Ludeke, J.T., *Is It Time To Revisit Whybrow's Case? (Australian Boot Trade Employees Federation v. Whybrow and Co.)*, 67 AUSTRALIAN L.J. 756-760 n.10 (Oct 1993)
 Samborn, Randall, *Seventh Circuit Panel Hears Electromotion Appeal*, 16 NAT'L L.J. 17 n.6 (Oct 11, 1993)
 Samborn, Randall, *Baseball's Lawyer: Robert DuPuy Goes To Bat for the Owners in Antitrust, Labor and Other Battles*, 16 NAT'L L.J. 1 n.7 (Oct 18, 1993)
 Anderson, Cerisse, *State Relieved From Contract With Building Workers' Union*, 210 N.Y.L.J. 1 n.70 (Oct 8, 1993)
 Brom, Thomas, *Children's Hours: A Reform Bill Would Strengthen State Child Labor Standards*, 13 CAL. LAW. 44(1) n.10 (Oct 1993)

FEDERAL LEGISLATION

The following list highlights some of the employment and labor related legislation introduced in the 103rd Congress. Future editions of this Newsletter will present only legislation introduced since the date upon which the previous list was compiled. If you wish to learn more about the bills listed here, the Library of Congress maintains an electronic bulletin board with all legislation introduced in every Congress since 1973. The data for the current Congress (the 103rd) is updated daily. Information on bills in the current Congress includes number, title, digest of the bill, sponsors/cosponsors, committee action and floor action. The bulletin board can be accessed, over Internet, at the Telnet address: *locis.loc.gov*.

H.J.Res.82. H.Con.Res. 78*, 203. H.Res. 288. H.R. 1, 5, 107*, 115, 126, 137*, 165*, 204*, 224, 246*, 349*, 370*, 377, 398, 423, 431, 680, 975, 1032, 1111, 1172, 1215, 1292, 1364, 1532, 1545*, 1609, 1900, 2016, 2099*, 2484, 2499*, 2554, 2710, 2721, 2729*, 2790, 2829, 2846*, 2867, 3458*, 3468, 3680, 3738. S.Res. 139. S.5, 17, 29*, 37, 53, 55, 103*, 404, 579*, 984, 1037*, 1439*, 1573, 1776, 1864.

One bill, H.J.Res.82, seeks a Constitutional amendment to guarantee individuals the right to an employment opportunity. Several pieces of legislation are designed to remove Congressional exemptions from employment discrimination statutes to which private employers are subject. These are marked with an asterisk, above. H.R.423 and H.R.431 deal with outlawing sexual orientation discrimination. Measures to eliminate or regulate electronic monitoring of the workplace are found in by H.R.1900 and S.984, and H.R.377 deals with drug testing. Two bills, H.R.2484 and S.1573 seek to equalize family and medical leave benefits for adoptive parents, with those of biological parents. And, S.1864 would make employers with fewer than fifteen employees subject liability for sexual discrimination.

Announcements

Article Submission

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, at College of Business - Station No. 49, Eastern New Mexico University, Portales, New Mexico 88130. Phone (505)562-2332. Fax (505)562-4331.

NAFTA Panel

The Employment and Labor Law Section and the International Law Section will cosponsor a panel discussion entitled, "The Effect of The NAFTA on Employment" at the Annual Meeting, in Dallas, this August. We are actively searching for people to be on the panel. If you are skilled in the area, or have suggestions for people who may be, please contact Laura Pincus, at *lpincus@wppost.depaul.edu* or (312) 362-6569. We would like the individuals on the panel to represent all sectors including management, labor, and government.

On the High Seas

Several members of the ALSB are exploring the possibility of crewing a 45-50 foot sailboat in the Virgin Islands immediately after the meeting in Dallas. They plan to spend much of the time discussing research on business law and ethics. It is expected to last one week and to cost around \$700, plus airfare (but isn't it just a puddle jump from Dallas?) If you have an interest in crewing, discussing and having some fun (no experience necessary in the former skill), please communicate with either Ed Conry (skipper) at *econry@cudnvr.denver.colorado.edu* or (303) 628-1295, or Laura Pincus (not the skipper, but something) at *lpincus@wppost.depaul.edu* or (312) 362-6569.