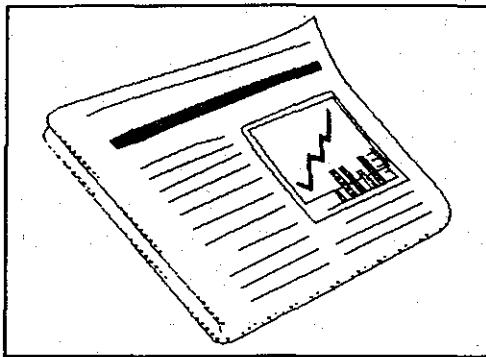

EMPLOYMENT AND LABOR LAW SECTION NEWSLETTER

Academy of Legal Studies in Business

Vol. 1, No. 1

March, 1993



INAUGURAL ISSUE

WELCOME!!

Welcome to the inaugural issue of the ALSB Employment and Labor law Section Newsletter. At the national meeting of the Academy last August, we became a recognized section of the ALSB. As such, we have dues check-off on membership forms and can sponsor programs at meetings. To become a member, send a note, enclosing \$5.00 dues, to Dan Herron, Executive Secretary of the ALSB. We are excited about this as a vehicle for current issues and ideas for teaching and writing. We invite your participation. If you are interested, contact Laura Pincus.)

The Family and Medical Leave Act: by Renee Culverhouse and Christine Lewis, Auburn University at Montgomery

The *Family and Medical Leave Act*, twice vetoed by Pres. Bush, was signed into law by Pres. Clinton on Friday, February 5, 1993. The Act will take effect six months from signing. While the Act's supporters enjoy their success and most large employers predict a minimal effect, many small employers are fearful of the rising costs associated with the implementation of the law and of disruptions in their work force. The Act, which it is estimated will effect only 5% of employers and 40% of workers: guarantees up to 12 weeks off per year, to employees for adoptions, births, or the care of sick children, spouses or parents; guarantees employees the same or equivalent position when they return from leave; and requires employers to provide health insurance during the leave period.

Employers may require employees to use sick, vacation, or other leave first. For births or adoptions, employees must provide thirty days' notice to employers. Employees must have been on the job for at least one year before they are covered. Only business with at least 50 workers within 75 miles are subject to the Act.

Unfortunately, as it was finally passed, the law only provides protection for the care of spouses. Those couples who live together but who are not married cannot avail themselves of the law when one of them is sick. Of course, if this concerns a different-gender couple, they can always "take the plunge" and get married. However, this alternative is not available in most states for same-gender couples. Not only are they afforded no protection under the law; they don't even have the opportunity to acquire such protection.

Management's Response to Sexual Harassment in The Workplace: by Edward Kelly, SUNY-Brockport and Carmela Pellegrino, SUNY-Brockport

The public outrage shown during last year's confirmation hearings of Associate Justice Clarence Thomas, not only in connection with the allegations of sexual harassment set forth by Anita Hill, but also with the handling of those allegations by those charged with conducting the hearing, provides fair warning to managers who fail to deal with allegations in an appropriate fashion. The stakes for all involved in such an allegation, the complainant, the accused, the manager charged with investigating the claim, and the employer are extremely high in terms of time and energy to be expended, stress and strain on working relationships throughout the enterprise, and the reputation of the enterprise to its various constituencies. With the passage of the Civil Rights Act of 1991, the potential for massive damages, court costs and attorney's fees in court actions increases significantly.

The major components of an effective management response to sexual harassment include a written policy on sexual harassment, effective procedures for reporting and investigating complaints and ongoing training. Enforcement and investigative procedures by the employer should include prompt investigation, letting the complainant know what are the time frames involved, questioning all individuals who may have knowledge of the complaint, resolving the credibility of all parties, and other means by which to determine the validity of the claim. The employer should obtain a complete narrative of the incident, identify all witnesses present, whether, how and to what extent the complainant's work environment has been changed as a result of this incident(s), and obtain information relating to any past occurrences. The accused harasser must be informed of the complaint and be given a reasonable time period in which to respond. Only once all of the information has been collected is the employer able to act effectively and reach a responsible determination of further action to be taken.

The Present State of Colorado's Amendment 2: By Renee Culverhouse, Auburn University at Montgomery

On 11/3/92, voters in the state of Colorado approved Amendment 2. This amendment made it illegal to pass legislation protecting homosexuals from discrimination based on their sexual orientation and overturned laws in Denver, Aspen and Boulder which had prohibited bias in jobs or housing based on sexual orientation. It should be noted here that this amendment was not passed by the legislature but by Colorado voters, by a margin of 54% to 46%.

The amendment is already being challenged in federal court by Denver, Aspen, Boulder, and several individuals, who claim that it violates the equal protection clause of the U.S. Constitution. Failing that effort, there will be a movement for a repeal of the amendment, but voters must wait a year before that option is available.

The entertainment industry has called for a boycott of the state of Colorado. The National Council for Social Studies, the American Association of Law Librarians, the National Education Association, and the Coalition of Labor Union Women have canceled plans for conventions in Colorado. Some cities, such as Aspen and Vail, are fighting back by publicizing their tolerance. In addition, companies within the state are making their views known by refusing to deal with suppliers and banks unless they have nondiscrimination policies.

Regardless, in the state of Colorado, by constitutional amendment, it is legal to discriminate in employment and housing on the basis of an individual's sexual orientation. Not only is such discrimination legal, but local governments are forbidden from counteracting the amendment's effect by passing local gay-rights ordinances. Consequently, lesbians and homosexuals must hide their sexual orientation when seeking jobs or housing.

HELP OUT, PARTICIPATE!
(Call Laura Pincus, 312/362-6569)

Tenured Faculty and the Mandatory Retirement Controversy [paper abstract]: by Jack Hires, Valparaiso University

At present, a tension exists between society's deep-seated concerns about age discrimination and educational institutions' propensity to use age as a criteria for tenured faculty retirement decisions. University and college administrators have several legitimate concerns about retaining older faculty, among which are higher salaries and difficulties in implementing minority hiring programs. However, even though age is an easy way to reach these difficult decisions, college and university administrators should be required to judge professors on an individual basis in terms of their ability to perform educational duties. Age does not necessarily inhibit a professor's ability to teach effectively, and youth does not guarantee quality teaching. Forced retirement may result in talented older professors being replaced by less talented younger professors.

ALSB Employment and Labor Law Section: Recent and Upcoming Events

In March, the Employment and Labor Law Section sponsored a **panel discussion** at the Midwest Academy of Legal Studies in Business Annual Meeting. The panel was entitled, "Employee Privacy Rights in The Private Sector." Discussants on the panel were scheduled to include Brad Reid (Abilene Christian University), Joseph Solberg (Illinois State University), Vincent Samar (Loyola University), and Laura Pincus (DePaul University). (Since I am writing this synopsis before the actual meeting has taken place, I cannot report to you the attendance, or the outcome, but I'd like to be able to say that it went perfectly well!) In addition, a breakfast meeting of the Section was planned to take place during the conference to discuss the direction of the Section.

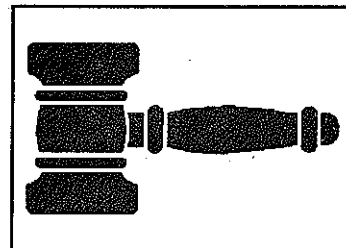
In connection with the ALSB Annual Meeting in Colorado, the Section intends to present **one (maybe two) panel discussion(s) relating to Amendment 2**. As the impact of the amendment will be strongest in the area of employment, we feel an obligation to investigate and discuss the extent of

this impact. Consequently, at this point, it looks like we will create a panel comprised of one legislator, one individual representing the gay and lesbian associations in the area, one Colorado legal scholar, and perhaps several individuals who have been or anticipate that they will be affected by the amendment. We hope to be able to present all sides to a difficult issue, while maintaining our focus on what can be done to better protect the rights of American employees. I am certain that this is an event not to be missed at the annual conference. In addition, there will be a **breakfast meeting of the Section** for all interested members.

Finally, if anyone is interested in highlighting a paper, addressing an interesting topic or offering an in depth discussion of a recent development in labor or employment law (note the dearth of articles in this issue on labor law: please help!), please contact Laura Pincus as soon as possible in connection with our next newsletter.

Recent Case Law and Legislative Developments: In Congress and Around the Circuits: by Roger Johns, Jr., Eastern New Mexico University

Family and Medical Leave Act of 1993 [Public Law 103-3]. Enacted February 5, 1993. The February 4, 1993 issue of Congressional Record contains much of the final legislative history and a penultimate form of the bill. Copies can be obtained from the House Documents Room [202/225-3456]. Information on states' experience and costs associated with availability/non-availability of leave can be obtained through Families and Work Institute [212/465-2044]; Center for Policy Alternatives [202/387-6030]; Institute for Women's Policy Research [202/785-5100].



[Recent Case Law and Legislative Dev'ts, Cont.]

Age Discrimination - Prima Facie Case Requirements. In *Finnegan v. Trans World Airlines*, 967 F.2d 1161 (7th Cir. 1992), TWA's curtailment of seniority-based vacation benefits had greater impact on older workers. Fearing that every practice having a disparate impact might suffice to help make out a prima facie case, the court held that, in addition to having a disparate impact, the employment practice must be more than "tenuously related to discrimination" and cannot be "remote from the objectives of civil rights law." In so holding, the court never reached the issue of whether the practice was justified by business necessity.

Retroactivity of the Civil Rights Act of 1991. With *Estate of Reynolds v. Martin*, No. 91-15237 (9th Cir. 1993), handed down on February 9, 1993, the Ninth Circuit became the first circuit to hold that the Act applies retroactively. Previously, the 5th, 6th, 7th, 8th, 11th and D.C. circuits had held that the Act applied prospectively only. Intra-circuit splits of authority continue within the Second Circuit [compare *Bridges v. Eastman Kodak*, 800 F.Supp. 1172 (S.D.N.Y. 1992) (retroactive) with *Kelber v. Forest Electric*, 799 F.supp. 326 (S.D.N.Y. 1992) (not retroactive)] and within the Fifth Circuit [compare *Tarver v. Functional Living*, 796 F.supp. 246 (W.D.Tx.) (retroactive) with *Clayton v. Nabisco*, 804 F.Supp. 882 (S.D.Tx.) (not retroactive)]. In fact, the holding in *Tarver* was handed down seven days after the 5th Circuit held that the Act applied only prospectively in a different case.

Synopsis of "Effects of Gender and Other Factors on Rank of Law Professors in Colleges of Business: Evidence of The Glass Ceiling": by Bruce Fisher, Steve Motowidlo and Steve Werner, U. Tenn., accepted for publication in the *Journal of Business Ethics*

Salary and professional advancement issues are much in evidence today in the business and academic communities. Our paper examines

salary determinants for law professors having professed a commitment to equal opportunity. We have held constant variable relevant to rank and salary to address the issues of whether gender is a factor in determining rank or salary. We used correlation and path analysis to reach conclusions; and our sample size meets statistical protocols. Our results corroborate other studies showing significant pay differences between men and women professors. However, the difference is largely explainable because universities compensate, at least partly, on the basis of seniority; and if women have only recently enjoyed career opportunities in this discipline, they will not have men's seniority, as our study indicates.

However, even after controlling for seniority and other factors which conceivably could affect rank, there are significantly fewer women in higher ranks, which points to the existence of a "glass ceiling" restricting women's advancement.

The Civil Rights Act of 1991: An Update: by Janice Franke, Ohio State University

The impetus for passage of recent civil rights amendments was a series of 1989-1990 Supreme Court cases retracting protections against employment discrimination under Title VII and Section 1981. Key aspects of the amendments related to five of those cases and include: the restoration of pre-Wards Cove burdens of proof in disparate impact cases (although the complainant generally must identify specific offending practices); specific recognition of Section 1981 claims based on racial discrimination impairing the performance, benefits, privileges, terms and conditions of a contractual relationship; extraterritorial application of Title VII; expanded recognition of mixed motive claims (though with limited remedies where respondent can justify a decision on non-discriminatory grounds); and, limits on challenges to remedial consent judgments or orders. The 1991 Act also added, for the first time, authority for the award of compensatory

and punitive "tort-like" claims under Title VII for victims of intentional discrimination. Such claims may be heard and decided by a jury. Again, through the compromise effort, those damages were capped at levels from \$50,000 to \$300,000 per complainant, depending on the size of the respondent's work force. Some efforts have been undertaken in Congress to remove those caps.

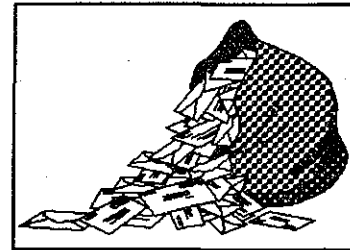
Insofar as these amendments reversed the "reversals" of previous interpretations and applications of the civil rights laws, they do no impact significantly on business operations. Although there may be a narrow window of time during which business were subject to less stringent non-discrimination requirements, most of the changes wrought by the amendments merely reinstate previously recognized liability or remedies. The issue that has been raised related to these amendments, however, is the retroactive effect of the changes. In the many cases that have been decided on the issue of retroactivity, courts have taken a variety of positions. The Supreme Court has not spoken directly on the issue; though, after passage of the 1991 Act, it remanded a case involving a denial of relief under Section 1981 for reconsideration in light of the amendments.

The addition of authority for the award of compensatory and punitive damages in cases of intentional discrimination under Title VII will have more impact on business, and will subject individual agents of the employer to "legal" damage claims. However, it should be noted that these damages merely extend the remedies previously available to victims of intentional racial discrimination to victims of intentional discrimination based upon membership in other protected classes (with caps only in the latter case). Also, such damages may have existed already for these additional cases under state law. Finally, it is noteworthy that this change increases the remedies available to victims of intentional discrimination, but does nothing to add substantive rights or liability under the Act. The provision of jury trial is a purely procedural change. The Supreme Court recently agreed to review a Fifth Circuit case denying retroactive effect to the provision authorizing these new damage awards.

More Housekeeping . . .: From Dawn Bennett-Alexander, Univ. of Georgia, and Laura B. Pincus, DePaul University, Editors

We hope to expand the "Recent Developments" section with the help of Roger Johns, Jr. (our "RD" Editor!) in order to provide an up-to-date employment and labor law resource for you. While labor was light (if not nonexistent) in this issue, we hope to expand our coverage of that area as well.

Regarding Colorado . . . Dawn and Laura have decided to attend the ALSB meeting in CO though both strenuously oppose Amendment 2. The purpose of going is to try to educate in a way we feel we could not if we stayed away. Follow your conscience, but we hope to see you there. While we do not speak for the Section, we think sexual activity should not be the basis for employment decisions for gays and lesbians any more than it is for anyone else. Just as this has happened to gays and lesbians, it can happen to others. So, if you agree, write letters, write articles, express yourself! And again, we hope to see you in Colorado!

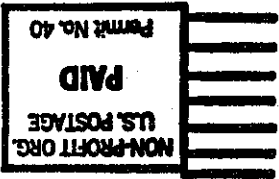


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