



LABOR AND EMPLOYMENT LAW  
ON BEHALF OF MANAGEMENT  
AND RELATED LITIGATION

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September 2000

Dear Clients and Friends of the Firm:

Our lead story in this issue of the EMPLOYMENT LAW UPDATE analyzes a landmark decision by the National Labor Relations Board which gives *non-unionized* employees the right to be accompanied by a co-worker to any investigation meeting with management which the employee reasonably believes may result in discipline. This new rule is a major extension of the so-called “*Weingarten*” rights enjoyed by union employees. We also analyze a long-awaited decision by the California Supreme Court which establishes guidelines for employers who wish to use mandatory arbitration as a means to resolve workplace disputes. This issue of the UPDATE also discusses important job bias rulings by the U.S. Supreme Court and the Ninth Circuit U.S. Court of Appeals, as well as articles on the following additional topics:

- Punitive Damages
- Employee Benefits
- Constructive Discharge
- Psychological Testing
- Independent Contractors
- Family Leave
- Pregnancy Discrimination
- RICO Lawsuit Against Union
- Religious Discrimination

Watch for our analysis of the recent amendments to the California Wage Orders which were adopted this summer by the California Industrial Welfare Commission. The amended Wage Orders are scheduled to take effect October 1, 2000.

Want more information about the Firm, our attorneys or services? Want to read a past issue of the UPDATE or see the dozens of articles published by members of the Firm? Check out our website at [www.brgslaw.com](http://www.brgslaw.com).

**Richard S. Rosenberg, Editor**

# EMPLOYEE INVESTIGATIONS

In a remarkable decision which affects virtually every employer, the National Labor Relations Board in Washington, D.C. has extended to *non-unionized* employees the right to insist upon the presence of a co-worker in any investigatory interview which the employee reasonably believes may result in discipline. (*Epilepsy Foundation of Northeast Ohio*)

- ***Background.*** In 1975, the U.S. Supreme Court confirmed that *unionized* employees have the legal right to be accompanied by a union representative in any investigatory interview with management where the employee reasonably believes that discipline may result. This right is commonly referred to as employees' "*Weingarten*" rights, after the case in which the legal principle was created. The Supreme Court stated: "A single employee confronted by an employer investigating whether certain conduct deserves discipline may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors. A knowledgeable union representative could assist the employee by eliciting favorable facts, and save the employer production time by getting to the bottom of the incident occasioning the interview."

In 1982, the NLRB extended *Weingarten* rights to the non-union setting. However, just three years later, in 1985, the Board overruled its 1982 decision and once again limited *Weingarten* rights *solely to unionized employees*. This has been the state of the law until just a few weeks ago.

- ***The Epilepsy Foundation Case.*** In February 1996, Arnis Borgs, an employee of the Epilepsy Foundation, was directed by the Foundation's Executive Director to meet with her and Borgs's immediate supervisor. The meeting concerned two memoranda issued by Borgs and a co-employee, Ashraf Hasan, which were critical of their supervisor. Borgs refused to meet alone with these managers and asked if he could either meet alone with the Executive Director or be accompanied by Hasan. The request was refused. When Borgs continued to express his opposition to meeting alone with his managers, he was sent home for the day. The following day, Borgs was terminated for refusing to participate in the meeting.

Borgs filed unfair labor practice ("ULP") charges with the NLRB. After a trial on the matter, the NLRB ruled that terminating Borgs for insisting upon a co-worker's presence at the meeting was a violation of the National Labor Relations Act. The NLRB ordered that Borgs be reinstated and compensated for all lost wages since his termination. In doing so, the Board reconsidered the state of the law and held that *Weingarten* should once again be extended to non-union employees. "[T]he Act generally affords employees the opportunity to act together to address the issue of an employer's practice of imposing unjust punishment on employees," the NLRB stated. When one employee requests the presence of a co-worker

during a meeting that the employee reasonably believes may lead to discipline, that employee is exercising a right under the Act.

In dissenting from the NLRB's decision, one Board member stated, "The work-place has become a garden of litigation and the Board is adding another cause of action to flower therein, but hiding in the weeds."

The Board did not address any specific issues related to *Weingarten* rights beyond an employee asking for a co-worker to be at the meeting. Future cases may address whether the holding of *Epilepsy Foundation* will be extended to situations where an employee asks for a non-employee (e.g., an attorney or union representative) to accompany the employee. The following questions demonstrate the challenges faced by employers in implementing this decision.

Q: Do *Weingarten* rights apply if none of our employees are unionized?

A: **Yes.** *Weingarten* rights now apply to all private sector employees whose employer is subject to the jurisdiction of the National Labor Relations Board. However, they do not apply to supervisors or managers who may be the subject of an investigation.

Q: Must I inform the employee of this *Weingarten* right or ask the employee if the employee wishes to be accompanied by another employee?

A: **No.** Employers are under no obligation whatsoever to advise an employee of *Weingarten* rights, or ask an employee whether the employee wishes to be accompanied by another employee during an investigatory interview. Thus, the *Weingarten* rights issue arises ***only if an employee asks*** to be accompanied.

Q: Do employees have these rights in every meeting with management?

A: **No.** These rights are available only with respect to investigatory interviews that the employee reasonably believes may lead to discipline. Meetings to announce a disciplinary decision or for other business matters unrelated to discipline are not impacted by their decision. However, employers should not attempt to mislead an employee as to the purpose of an interview. If a meeting is merely to inform the employee of the disciplinary action that the employer has decided to take, the employee is not entitled to be accompanied, even if the employee so requests.

Q: Does *Weingarten* apply to ordinary questions a supervisor may pose to an employee during the course of a workday?

A: **No.** *Weingarten* does not apply to routine questions regarding work performance or ordinary "run of the mill" workplace discussions.

- Q. Does an employee have the right to meet with another employee prior to starting the investigatory interview?
- A. **Yes.** Under *Weingarten*, an employee has a right to consult with a co-employee *prior* to the interview. Either employee may invoke this right merely by requesting it. Once again, however, the employer does not have to volunteer to either employee that such a right exists.
- Q. Does an employee who learns that another employee is about to be subject to an investigatory interview have the right to request to be present?
- A. **Yes.** But whether the co-employee will be allowed to be present depends on whether the employee being interviewed agrees.
- Q. Does an employee have the right to select any co-employee?
- A. **Depends.** The employee may *not* insist on a *particular* co-employee being present, if another co-employee is available, and the particular co-employee requested is unavailable. The employer is not required to provide or suggest an alternative co-employee for the employee.
- Q. What if I do not wish to interview an employee with a co-employee present?
- A. **You may refuse to hold the interview with a co-employee being present.** If you decide to do so, the employee has the choice of either refusing to be interviewed or proceeding without a co-employee being present. However, if you *require* the employee to be interviewed without the co-employee present, over the employee's objection, you may later be required by the NLRB to disregard any statements made by the employee during the interview.
- Q. What type of conduct must I tolerate from the co-employee during this meeting?
- A. **Very little.** If a co-employee is present during the investigatory interview, he/she is there merely to advise the employee and act as an observer. The co-employee is *not* permitted to bargain with you, disrupt the interview, or attempt to steer your investigation off track. If the co-employee attempts to interfere with your investigation (*e.g.*, objecting to questions, telling the employer not to repeat questions, or instructing the employee not to answer), the employer has the right to ask the co-employee to leave the meeting.
- Q. Does *Weingarten* give an employee the right to refuse to answer questions?
- A. **No.** Such conduct would, absent a practice of tolerance by the employer, amount to insubordination.

- Q. Is there any action I can later take against an employee because he/she insisted on being accompanied by a co-employee during an investigatory interview?
- A. **No.** Any attempt at retaliation may be reversed by the NLRB. The Board has the ability to order reinstatement, backpay, reversal of a suspension, withdrawal from a personnel file of a written warning, etc. In addition, in all cases in which a violation is found, the employer will be ordered to post a notice to all employees for 60 days stating that it will not again engage in such unlawful conduct (which will be described in the notice for all of your employees to read).

## **CALIFORNIA SUPREME COURT UPDATE**

- ***Arbitration Of Job Bias Claims.*** Just before we went to press, the California Supreme Court issued its long-awaited ruling in a landmark case which addresses when so-called pre-dispute agreements to arbitrate job bias claims may be enforced in court. The Court unanimously ruled that such agreements ***are*** generally enforceable, but ***only if*** they meet certain minimum requirements to adequately protect the rights of employees. These requirements include: (1) a provision for a neutral arbitrator or arbitrators; (2) no limitation on available remedies, such as lost wages, emotional distress damages, punitive damages and attorneys' fees; (3) adequate discovery of documents and other relevant information; (4) a written decision by the arbitrator which reveals the reasons for the arbitration award; (5) not requiring the employee to pay unreasonable costs or arbitration fees; and (6) no other "one-sided" provisions that create special advantages for the employer, such as requiring only the employee, and not the employer, to submit claims to arbitration. The Court ruled that the arbitration agreement in this case was ***unenforceable***, because it only applied to wrongful termination claims brought by employees, and limited the employees' potential recovery to damages for lost wages. The Court rejected the finding made by a lower appellate court that the arbitration agreement could be enforced by deleting the provision that limited damages. (*Armendariz v. Foundation Heath Psychare Services*)

The California Supreme Court's decision comes as a relief to many California employers, who had feared the Court would outlaw pre-dispute agreements to arbitrate job bias claims or drastically limit the enforcement of such agreements. Instead, the Court has now given a "green light" to employers to require employees to enter into pre-dispute arbitration agreements which meet all of the requirements set forth in the Court's ruling. The next round in the debate over agreements to arbitrate employment disputes may come in our state Legislature, which is likely to consider the issue again in the near future. In the meantime, employers who are considering having their employees sign agreements to arbitrate all employment disputes should consult their contact at the Firm.

- **“Continuing Violations”.** The California Supreme Court has agreed to review a state Court of Appeal decision discussed in the May 2000 UPDATE which strictly limited the scope of the so-called “continuing violation” exception to the statute of limitations in job bias cases. Under this exception, employees can reach back in time to events which occurred long ago to support a current claim – on the theory that the current behavior is just a continuation of the old. The Court of Appeal had thrown out a \$1.4 million jury verdict for an employee in a disability bias lawsuit because most of the unlawful acts in the case took place more than one year before filing suit, and hence, were barred by the statute of limitations. The court rejected the plaintiff’s argument that all of the employer’s alleged violations of disability rights laws over a five-year period constituted a “continuing violation.” This decision was viewed as a major victory for employers. However, the case is now “off the books” because the state Supreme Court has granted review. We will keep you informed of further developments in this case in future issues of the UPDATE. (*Richards v. CH2M Hill Inc.*)

- **Employee Privacy.** The state Supreme Court has “depublished” another important California Court of Appeal decision reported in our May 2000 UPDATE. In that case, the appellate court required a hospital to reveal the home phone numbers and addresses of its employees who were witnesses when asked by the plaintiff. The appellate court had ruled that the plaintiff’s right to “discovery” outweighed the employees’ right to privacy in their home phone numbers and addresses. The hospital asked the California Supreme Court to review the case. The Supreme Court declined, but agreed that the case should be “depublished,” which means it cannot be used as precedent in future cases. The Supreme Court’s action will help employers who seek to protect the privacy of their employees’ home phone numbers and addresses. (*Valley Presbyterian Hospital v. Superior Court*)

## **U.S. SUPREME COURT ISSUES** **MAJOR JOB BIAS RULING**

Since our last issue of the UPDATE, the U.S. Supreme Court has issued a landmark decision affecting what an employee needs to prove to win a job bias lawsuit. The plaintiff, Roger Reeves, had worked at Sanderson Plumbing Products for 40 years when he was terminated at age 57. Reeves claimed he was terminated because of his age. He offered evidence that a supervisor who was principally responsible for terminating him made age-biased remarks, including that Reeves was “so old [he] must have come over on the Mayflower” and that he “was too damn old to do [his] job.” In addition, Reeves offered evidence that a younger employee was treated more favorably than he was, and that the company’s reason for terminating him (poor performance) was false and pretextual. A jury found in Reeves’s favor, and he was awarded nearly \$100,000. Despite this evidence, the Fifth Circuit U.S. Court of Appeals threw out the jury verdict because it concluded that Reeves lacked any real “direct evidence” of age bias. Although Reeves was able to establish

that the reason offered by his employer was untrue, he had no independent evidence that his age played a role in his termination.

The U.S. Supreme Court used this case to take another look at just what is needed to prove a claim of job discrimination. The Court ruled that proving that the employer lied about why the employee was being discharged is enough to allow the jury to infer that the real reason was alleged discrimination. Independent evidence of actual age bias is not essential. (*Reeves v. Sanderson Plumbing Products, Inc.*) Many commentators believe that the *Reeves* decision makes it more difficult for employers to win job bias cases, or get them thrown out early, because the employee no longer has to come up with actual evidence of discrimination. However, the decision should come as less of a surprise for California employers because this has long been the rule in our Ninth Circuit U.S. Court of Appeals and under our state's job bias law. The *Reeves* case demonstrates once again that it is a risky practice to misrepresent the reasons for termination or other personnel actions.

## **NINTH CIRCUIT UPDATE**

Our Ninth Circuit U.S. Court of Appeals has been very busy this year issuing decisions which will make it easier for employees to make out claims for job bias under state and federal job bias laws.

- ***Weight Restrictions.*** A class of female flight attendants scored a major victory in their lawsuit against United Airlines for age and sex discrimination. The basis for the lawsuit was the airline's maximum weight requirements. United had different rules for men and women. United's female flight attendants were required to weigh from 14 to 25 pounds less than their male counterparts of the same age and height. The plaintiffs (who were terminated or disciplined for failing to comply with the applicable weight requirements) sued United for sex and age bias. A lower court threw out the entire lawsuit and ruled in favor of United. However, the Ninth Circuit concluded that the *plaintiffs*, rather than United, were entitled to judgment in their favor with respect to the sex discrimination claim. The court noted that United's weight requirements were discriminatory on their face and that United offered no "bona fide occupational qualification" which would allow men and women to be subjected to different weight requirements. The court also permitted the plaintiffs to proceed to trial on a theory of age discrimination, claiming that United's weight guidelines did not take the "middle age spread" into consideration, and thus had a discriminatory impact on employees over the age of 40. (*Frank v. United Airlines*)

- ***Retaliation.*** Our job bias statutes outlaw retaliation against persons who use the law in some way. In order to prove illegal retaliation, an employee must prove that he or she was subjected to an "adverse employment action" of some sort. The purpose of this requirement is to prevent spurious retaliation lawsuits based on minor or trivial events. Unfortunately, a recent Ninth Circuit decision greatly expands the scope of what is an

adverse employment action for purposes of retaliation claims. The case before the court involved a postal carrier who had complained about sex discrimination. After receiving this complaint, management eliminated employee meetings, did away with its flexible starting time policy, instituted a “lock down” of the workplace and cut the employee’s salary. The Ninth Circuit used this case to examine the whole area of what it takes to establish a retaliation claim. The court ruled that *all* of these events could form the basis of a retaliation claim. According to the court, an adverse employment action does not have to be all that significant. It need only be reasonably likely to deter the complaining party or others from asserting their rights under the law. The court went so far as to state that lateral transfers, unfavorable job references and changes in work schedules might be sufficient to establish retaliation as well. The court also ruled that the plaintiff could sue the postal service for a hostile work environment which was the result of retaliation. (*Ray v. Henderson*)

In another retaliation lawsuit, the Ninth Circuit ruled that United Airlines may be liable for retaliation resulting from complaints about co-employee sexual harassment. The court concluded that United was potentially responsible for at least two acts of alleged retaliation against Joanne Fielder. The first involved United’s failure to transfer Fielder after she complained about sexual harassment. The other involved an incident which took place while Fielder was on medical leave. Fielder returned to the airport one day to escort her disabled mother onto a United flight, only to be chastised and humiliated by a United supervisor in front of the flight attendants, passengers and her mother. Fielder was reprimanded for “poor judgment” because she had brought her mother to the airport. The court concluded that there was sufficient evidence for a jury to conclude that United’s reprimand of Fielder and its failure to give her a transfer were the result of retaliation against Fielder based on her complaint of sexual harassment. In addition, the court ruled that Fielder could base her lawsuit on alleged harassment that took place several years ago, under the “continuing violations” theory. A dissenting judge noted that this portion of the court’s ruling would all but eliminate the statute of limitations defense in job bias cases. (*Fielder v. UAL Corp.*)

In another case, however, a different panel of Ninth Circuit judges ruled that a negative performance evaluation was *not* enough to form the basis for a retaliation claim. The court noted that the evaluation was later revised to delete all of the lowest performance ratings, and that the plaintiff did not suffer any negative consequences, such as demotion or pay loss. (*Kortan v. California Youth Authority*)

- ***Isolated Instances Of Sexual Harassment.*** The Ninth Circuit recently rejected a sexual harassment claim which was based on two instances of alleged inappropriate conduct. The harasser in this case, Steven Selvaggio, first placed his hand on plaintiff Patricia Brooks’s stomach. Brooks told Selvaggio to stop touching her and then forcefully pushed him away. Selvaggio later boxed Brooks into a corner and placed his hand on her breast. Brooks removed Selvaggio’s hand and told him that his behavior was unacceptable. She reported the incidents to her employer. Other female employees came

forward and reported that Selvaggio had harassed them as well. Selvaggio resigned before he could be terminated. He later pled guilty to misdemeanor assault charges and spent 120 days in jail. Meanwhile, Brooks sued the company for sexual harassment. However, a federal judge dismissed the lawsuit and concluded that Selvaggio's conduct was isolated and not severe enough to support a claim for sexual harassment. The Ninth Circuit agreed. (*Brooks v. City of San Mateo*) Employers should note, however, that some courts have allowed sexual harassment lawsuits to proceed on one-time incidents of misconduct that were extremely severe. For example, the Second Circuit U.S. Court of Appeals in New York recently allowed a sexual harassment lawsuit to go forward where the plaintiff was subjected to a one-time verbal barrage of extremely offensive sexual and gender-based insults. (*Houley v. Town of Stratford*) Similarly, the Seventh Circuit in Chicago allowed a plaintiff to sue for sexual harassment where a co-employee forcibly stuck his tongue down the plaintiff's throat and attempted to unfasten her bra. (*Hostetler v. Quality Dining, Inc.*)

- **“Direct Threat” Defense.** The Ninth Circuit has drastically limited the employer's “direct threat” defense in disability bias lawsuits. This defense allows an employer to refuse to accommodate a disabled person if the employment would “pose a direct threat to the health or safety of other individuals in the workplace.” However, the Ninth Circuit ruled that an employer may not reject a job applicant whose disability poses a “direct threat” only to *himself*, but not to other employees. The lawsuit was filed by Mario Echazabal, who applied for a job at a Chevron oil refinery. Chevron refused to hire Echazabal based upon the results of a physical examination which revealed that his liver might be damaged by exposure to the solvents and chemicals present at the refinery. Echazabal sued for violation of the Americans with Disabilities Act. Chevron responded by asserting the “direct threat” defense. Echazabal's lawsuit was thrown out by a federal judge, but was later reinstated by the Ninth Circuit. The court noted that the ADA's language, as well as the supporting regulations, state that the “direct threat” must relate to the “health or safety of *other individuals*,” not to the employee or applicant. On that basis, the court concluded that Chevron could not assert the “direct threat” defense as a basis for rejecting Echazabal's job application. The court further rejected Chevron's argument that an “essential function” of the job was the employee's ability to perform the job without posing a threat to his own health or safety. (*Echazabal v. Chevron U.S.A., Inc.*)

- **Employees “Regarded As” Disabled.** Another Ninth Circuit disability bias ruling serves as a reminder that employees who are “regarded as” being disabled are protected under the federal and state disability bias laws. Once again, United Airlines found itself on the losing side of the Ninth Circuit's decision. This lawsuit was brought by an airline mechanic named Richard Deppe who had back and neck injuries. Deppe's doctor released him to return to work as long as he avoided heavy lifting, repeated bending and stooping, and frequent twisting and turning of the neck. Based upon Deppe's medical restrictions, United concluded that there was no accommodation that it could offer Deppe which would enable Deppe to return to his position as a mechanic, and that he could not be transferred to another position. As a result, Deppe was terminated. Deppe claimed that even

if he was not disabled, United regarded him as such. A federal court judge dismissed Deppe's disability bias lawsuit and found that Deppe was not "regarded as" being disabled. However, the Ninth Circuit overturned this ruling and sent the case back for trial. The Ninth Circuit concluded that there was conflicting testimony as to United's perception of Deppe's abilities and what jobs he could perform. According to the court, a rational jury could conclude that United regarded Deppe as significantly restricted in his ability to perform a broad range of jobs in various classes. (*Deppe v. United Airlines*)

- ***Unqualified Individual Loses Disability Bias Suit.*** In a rare victory for employers, the Ninth Circuit upheld the dismissal of a lawsuit in which a plaintiff who suffered from multiple sclerosis was terminated for poor job performance. According to the court, the individual was not a "qualified individual with a disability" because she was incapable of performing the essential functions of her job with or without accommodation. The employee conceded that her performance was poor, but claimed her employer was to blame for refusing to transfer her to a different supervisor. However, the court found no evidence to support the plaintiff's claim and ruled in favor of the company. (*Braunling v. Countrywide Home Loans Inc.*)

## **PUNITIVE DAMAGES**

The California Court of Appeal recently issued a decision which will help companies seeking to avoid expensive awards of punitive damages. The company in this case was represented by Scott Freedman, who is a Senior Counsel with our Firm. The plaintiff, Victor Cruz, claimed that he was falsely accused of stealing a piece of plywood and was unlawfully kicked, pushed, handcuffed and detained by a store security guard and the guard's supervisor. Cruz was arrested and prosecuted on misdemeanor charges, but was acquitted. Cruz then turned around and sued the company for battery, false imprisonment and malicious prosecution. A Los Angeles jury awarded Cruz a total of \$665,000 in damages, including \$400,000 in punitive damages. However, the appellate court overturned the award of punitive damages because there was no evidence that any officer, director or "managing agent" of the company was guilty of malice. The court specifically ruled that the supervisor was not a "managing agent" because he only supervised a few security employees and had no authority over the corporation's rules or policies. The court also found no evidence that any of the company's officers, directors or managing agents had actual knowledge that the supervisor or the security guard acted maliciously. The evidence was therefore insufficient to justify punitive damages against the company. (*Cruz v. HomeBase*)

## **EMPLOYEE BENEFITS**

The Ninth Circuit U.S. Court of Appeals has backed away from its controversial 1999 ruling in *Bins v. Exxon Co. U.S.A.*, which imposed burdensome disclosure responsibilities

on fiduciaries for retirement plans. We reported on the court's original ruling in this case in our October 1999 UPDATE. Under last year's ruling, which was issued by a three-judge panel of the Ninth Circuit, a fiduciary was required to notify plan participants of any **potential** changes to retirement benefits as soon as such changes are being "seriously considered" – **regardless** of whether the employees even asked for the information. However, a full 11-judge panel of the Ninth Circuit has modified this standard. Under the new test, a plan administrator has no duty to volunteer information about potential plan changes which have yet to be adopted, **unless** a plan participant asks for such information. Upon receiving such a request, the plan administrator has a duty to provide complete and truthful information about any changes which are currently under serious consideration. The court also ruled that a plan administrator does **not** have a duty to follow up with an employee if, after the employee's request, the proposed changes reach the "serious consideration" stage, unless the employer agrees to do so. Under the Ninth Circuit's standard, an employer has given "serious consideration" to amending a retirement plan "[w]hen (1) a specific proposal (2) is being discussed for purposes of implementation (3) by senior management with the authority to implement the change."

## **DISABILITY DISCRIMINATION**

- ***Reasonable Accommodations.*** The California Court of Appeal has once again ruled that employers must undertake considerable efforts to "reasonably accommodate" their disabled employees. Susan Spitzer, who was employed as a Store Manager at a Good Guys store in San Francisco, suffered from a severe back condition which made her unable to stand and walk extensively, as her job required. The employer accommodated Spitzer by giving her more breaks, therapy leave and a chair to sit in while on the job. However, the employer rejected Spitzer's request for a transfer to a more "sedentary" job, even though such positions were available. Spitzer ultimately quit her job and sued under the state's disability bias law. A trial judge dismissed Spitzer's lawsuit, but the California Court of Appeal reinstated the case and sent it back for trial. The appellate court found evidence that the employer knew its attempts to restructure Spitzer's job were unsuccessful and inadequate. The court further stated that the other available jobs were "reasonable accommodations" that would not have posed an undue hardship on the employer. However, the court also ruled that the employer could **not** be held liable for punitive damages in this case. The court stated that the employer's actions "may have been wrongful and illegal, and perhaps even reckless," but that there was not enough evidence of malice to justify punitive damages. (*Spitzer v. The Good Guys, Inc.*)

- ***Plaintiff "Smells" Victory.*** A recent decision by a Utah federal judge shows that the Americans with Disabilities Act can sometimes lead to bizarre results. The judge allowed plaintiff Glenda Davis to proceed with her disability bias lawsuit based on her claim that she was extremely sensitive to the scented perfume and hand lotion used by her co-employee. Davis claimed that her sensitivity to strong fragrances resulted in headaches,

nausea, confusion, numbness, quickened heart rate, watery eyes and troubled breathing. Davis's employer, the Utah State Tax Commission, was able to accommodate Davis for six years by keeping her away from co-workers who wore perfume. However, in April 1996, Davis was assigned to sit near a co-employee who used a strongly-scented hand lotion. The employer would not move Davis again and the co-employee refused to stop using the lotion. Davis quit four months later and sued for violation of the ADA. The judge in this case noted that there was evidence that Davis was disabled under the ADA definition because she was "substantially limited" in the "major life activity" of breathing – even though Davis did not suffer from breathing problems outside of work – and that the employer could have "reasonably accommodated" Davis by transferring her again or by prohibiting her co-employee from wearing the hand lotion. The judge therefore ruled that Davis had enough evidence to go to trial on her ADA claim. (*Davis v. Utah State Tax Comm'n*)

## CONSTRUCTIVE DISCHARGE

Employees who "quit and sue" face a difficult task in proving they were "constructively discharged" under California law. Under our state Supreme Court's 1994 decision in *Turner v. Anheuser-Busch, Inc.* (handled by Ballard, Rosenberg, Golper & Savitt lawyers John B. Golper, Jeffrey P. Fuchsman and John J. Manier), the employee must prove two things. First, that the working conditions were so intolerable that a reasonable employee would have had no choice but to resign. Second, that the employer was aware of the situation, but refused to do anything about it. Because of the *Turner* decision, employers often succeed in getting constructive discharge claims dismissed before trial.

In a recent decision, however, the California Court of Appeal ruled that plaintiff Scott McFeters had sufficient evidence to prove he was indeed constructively discharged. McFeters worked as a sales representative for a computer equipment leasing company. He complained to his employer about leasing practices which he believed were deceptive and/or illegal. The company's President and Chief Executive Officer, Patrick Paddon, told McFeters that he had a bad attitude and ordered him not to discuss his complaints with any other employee. After McFeters disobeyed these orders, the CEO became enraged. According to court records, he lunged at McFeters, grabbed him, hit him, shook him, and dragged him out of the office and down a hallway, yelling, "You're f---ing fired!" Paddon then told McFeters to sit in a reception area and stay there until McFeters's supervisor arrived. The supervisor eventually persuaded Paddon to calm down, but Paddon continued to torment McFeters over the next several months. McFeters eventually quit and sued the company and Paddon for constructive discharge in violation of public policy, assault and battery, and other related claims. The trial judge dismissed everything except the assault and battery claims. The jury awarded McFeters \$870,000 in damages for assault and battery, but the trial judge slashed this award to \$3,000. On appeal, the Court of Appeal ruled in McFeters's favor on *all* claims. It found that McFeters had sufficient evidence to show he was constructively discharged, because Paddon's violent conduct created a situation which

“no reasonable person would have tolerated.” The court also noted that a discharge for opposing unlawful business practices, as alleged by McFetters, would violate “public policy” under California’s unfair competition laws. The appellate court gave McFetters the option of accepting the \$870,000 jury verdict on his assault and battery claims, or seeking a new trial on all of his claims. (*McFetters v. Amplicon, Inc.*)

## **PSYCHOLOGICAL TESTING**

A national rent-to-own company recently agreed to pay \$2 million to nearly 1,000 employees and job applicants who filed suit because the company had required them to submit to a lengthy psychological test. The test, known as the “MMPI,” is frequently given by psychiatrists and psychologists. Included as part of the 502 question “true or false” exam were statements about the applicant’s religious and sexual practices. The statements included: “My sex life is satisfactory”; “I am strongly attracted to members of my own sex”; and “I believe that there is a God.” The lawsuit alleged that employees and applicants have a reasonable expectation of privacy with respect to this type of information and that the employer had no legitimate, work-related reason to ask these intrusive questions. As part of the settlement, the employer agreed to stop administering the tests in the future. (*Staples v. Rent-A-Center*) A few years ago, we reported on a similar settlement by Dayton Hudson Corporation (Target Stores) over the same test. Employers considering *any* psychological exam should contact the Firm for further advice.

## **INDEPENDENT CONTRACTORS**

The California Court of Appeal recently examined what it takes to be an independent contractor. The Court concluded that an individual who collected gasoline samples from gas stations for Southwest Research Institute was indeed an “independent contractor,” rather than an “employee” of the Institute. The issue arose when the individual brought a claim against the Institute for unemployment benefits. He claimed he had to be an employee because he was required to follow very precise instructions as to how to collect the gasoline samples and ship them to the Institute. The plaintiff also was required to follow procedures which he had learned at a mandatory one-day training session. He argued that these requirements demonstrated that he was actually an employee of the Institute because the Institute controlled the methods and means of how the job was to be done. However, the appellate court noted that the methods the plaintiff was required to follow were dictated by health and safety regulations imposed by government agencies, such as the EPA and FAA. Under these circumstances, the Institute did not exercise the requisite level of control over his work to categorize the plaintiff as an “employee.” In addition, the court noted that the plaintiff was regularly employed elsewhere; worked sporadically; was paid on a per-sample basis; and worked without direct on-site supervision. The court found that each of these factors further supported a finding that the plaintiff was an independent contractor, and rejected the plaintiff’s claim for unemployment benefits. (*Southwest Research Institute v.*

*Unemployment Ins. Appeals Bd.*) Categorizing workers as independent contractors is a risky practice. Consult your contact at the Firm for further information.

## **FAMILY LEAVE**

- ***Governor Vetoes Expansion Of Family Leave Law.*** California Governor Gray Davis recently vetoed SB 118 (Hayden). As discussed in our May 2000 issue of the UPDATE, this bill would have further expanded our state's Family Rights Act to include, among other things, leave to care for a grandparent, sibling, domestic partner, or individuals with serious health conditions, who depend on the employee seeking the leave for immediate care and support, and who share a common residence with the employee. In his veto message, Governor Davis commented that "[t]his measure, while well-intentioned, extends [the right to family leave] far beyond what any other state has permitted to a relationship outside the family – specifically, to individuals who live together to share expenses, if one of those individuals subsequently becomes seriously ill." However, Davis indicated that there were portions of SB 118 he could sign into law, and that he "would be pleased to work with the Legislature during the next Legislative session to fashion an appropriate bill."

- ***Notice Requirements.*** The Sixth Circuit U.S. Court of Appeals has recognized an exception to the rule that the Family and Medical Leave Act ("FMLA") only provides for 12 weeks of leave per year. In a case where an employer never notified the employee that his 12 weeks of absences were to be counted as FMLA leave, the court ruled that the employee was entitled to an ***additional*** 12 weeks of FMLA leave. (*Plant v. Morton International*) This decision is consistent with the Department of Labor's regulations under FMLA. However, it contradicts rulings by the Second and Eleventh Circuit Courts of Appeals, as reported in our October 1999 UPDATE, as well as a recent decision by the Eighth Circuit. (*Ragsdale v. Wolverine Worldwide, Inc.*) Meanwhile, the Seventh Circuit has rejected a DOL regulation that provides that "if the employer fails to advise the employee whether the employee is eligible [for FMLA leave] prior to the date the requested leave is to commence, the employee will be deemed eligible." As the court pointed out, this regulation would allow employees who are ***ineligible*** for FMLA leave to obtain a "windfall." The court found that the DOL regulation was not supported by the clear language of the FMLA. Thus, the court rejected the FMLA claim of a plaintiff who had not worked enough hours during the previous year to become eligible for FMLA leave. (*Dormeyer v. Comerica Bank-Illinois*)

- ***Birth And Adoption Leave.*** Effective August 14, 2000, a Department of Labor regulation will permit states to use their unemployment insurance funds to pay benefits to employees who take leaves of absence for births or adoptions. However, the Society for Human Resources Management ("SHRM") recently filed a federal court lawsuit to prevent the DOL from enforcing this regulation. SHRM contends that the regulation

exceeds the DOL's authority under the FMLA, which provides only for *unpaid* leave. In addition, employees who take *temporary* leaves of absence from their jobs have never been eligible for benefits under the Social Security Act or the Federal Unemployment Tax Act.

- ***Emotional Distress As "Serious Health Condition."*** The Eighth Circuit has ruled that an employee who received medical treatment for job-related emotional distress suffered from a "serious health condition" as that term is used under FMLA. The employee claimed the stress resulted from an argument with her supervisor. She gave her employer a note from her doctor stating that she would not be able to work for two weeks. When the employee took the time off, she was terminated for job abandonment. She brought suit under the FMLA. The Eighth Circuit concluded that, under the circumstances, the employee could be incapacitated for purposes of FMLA "at least to the extent of being unable to work in her current job." (*Stekloff v. Saint John's Mercy Health Sys.*)

## **PREGNANCY DISCRIMINATION**

The First Circuit United States Court of Appeals recently overturned the dismissal of a lawsuit for sex and pregnancy discrimination by an employee who was terminated on the 89th day of her 90-day probationary contract. The employee claimed that, shortly after she began her job as the company's Director of Finance and Administration, the Vice President/General Manager asked her about her ability to balance work and family obligations, and about "how her husband was managing, considering she was not home to cook for him." A Senior Vice President also allegedly asked the employee "how her work was proceeding in light of her child" and questioned whether she could perform her job effectively after having a second child. The employee further testified that when she complained that a proposed profile of potential hires for use at a company job fair excluded married women and women with children, the Vice President/General Manager responded that "he preferred unmarried, childless women because they would give 150 percent to the job." In spite of all these comments, a federal trial judge dismissed the employee's lawsuit for sex and pregnancy discrimination. On appeal, the First Circuit said there was enough evidence of bias to go to a jury and sent the case back for a jury trial. (*Santiago-Ramos v. Centennial P.R. Wireless Corp.*)

## **RICO LAWSUIT AGAINST UNION**

The Ninth Circuit recently rejected a Hotel's lawsuit against a Union under RICO, the federal anti-racketeering law. The Hotel had claimed that the Union engaged in mail and wire fraud by using mail and wire communications to make misrepresentations about the Hotel to its current and potential customers. As a result, the Hotel claimed that the Union deprived the Hotel of its business "goodwill," which has been recognized as a property right in California. However, the Ninth Circuit ruled that the Hotel failed to show that the Union made the misrepresentations with an intent to obtain money or property. Instead, the court

concluded that the Union did not obtain any property by deceiving the Hotel or its customers, and was simply carrying out a strategy in a protracted labor dispute. For these reasons, the court ruled that the Union had not violated RICO. (*Monterey Plaza Hotel Ltd. Partnership v. H.E.R.E. Local 483*)

## **RELIGIOUS DISCRIMINATION**

The U.S. Equal Employment Opportunity Commission (“EEOC”) recently issued a decision which dramatically expands the scope of the provisions against religious discrimination under the federal job bias law, Title VII. The EEOC ruled that bizarre and unusual scientific theories, such as “cold fusion” or alleged messages from extraterrestrial beings, may qualify as “religions” which are entitled to protections against job bias. The case was brought by Paul LaViolette, an astronomer who was discharged by the federal Patent and Trademark Office in April 1999. LaViolette claims he was terminated because he has many unorthodox scientific beliefs. Among other things, LaViolette believes in “cold fusion,” which is an extremely controversial theory pertaining to energy generation. He also thinks there is “proof” of the existence of alien radio communications and theorizes that the zodiac is a “time capsule” message. According to LaViolette, “there is a connection between my scientific beliefs and my very deep religious feelings.” The EEOC found that if LaViolette’s allegations are true, the Patent and Trademark Office may be guilty of religious discrimination in violation of Title VII. It remains to be seen whether any court will adopt the EEOC’s controversial interpretation of the federal law against religious bias.

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