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Employment Discrimination

Publication 626 Release 69 February 2005

HIGHLIGHTS

Text Revisions

- Chapters 155 through 167 have been completely revised in this release. In addition, all volumes of the treatise have been updated with the latest developments in employment discrimination law.

Digest of Cases

- In this release the case digests for Chapters 1–19 and Chapters 155–167 have been reorganized to conform to our new case digest format. The case digests throughout the Treatise have been updated with new cases related to topics discussed in the text. Cases are listed according to chapter, section, footnote number, and corresponding propositions of law.

2004 CIVIL RIGHTS TAX RELIEF:

The American Jobs Creation Act of 2004 permits successful plaintiffs in discrimination actions to deduct attorney's fees and court costs on their income tax returns. The Civil Rights Tax Relief provision of the Act amends the Internal Revenue Code to permit a deduction from gross income for "attorney fees and court costs paid by, or on behalf of, the taxpayer in connection with any action involving a claim of unlawful discrimination." The statute applies to a variety of civil rights and antidiscrimination statutes, including Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, the Rehabilitation Act, the Reconstruction Statutes, and the Americans with Disabilities Act, and is in effect for costs and fees paid pursuant to a judgment or settlement that occurs after the date of enactment, which was October 22, 2004. **See Chapter 97, Attorney's Fees and Costs, § 97.16, and Chapter 147, Fees, Costs, Interest and Penalties, § 147.04.**

RECENT DECISIONS OF INTEREST:

Retaliation claims may be brought only by those who themselves engaged in protected conduct. In *Higgins v. TJX Cos.*, the plaintiff alleged that the employer failed to hire him due to the sexual harassment claim previously filed against the employer by the plaintiff's cousin, a former employee of TJX. The federal district court in Maine rejected the argument that the plaintiff was entitled

to Title VII protection based on his cousin's protected activity. The statute's language is clear, found the court: the retaliation must be experienced first-hand, in response to the plaintiff's own protected conduct, to engender a claim under Title VII. **See Ch. 35, Retaliation: Stages of Proof, § 35.02 n.12.**

To make out a case of associational discrimination, a "significant" relationship must be shown. In *Baker v. Wilmington Trust Co.*, Delaware's federal district court rejected an associational claim grounded in racial bias because the plaintiff had neither a spousal nor a family connection to the members of the protected class. The bank teller-customer bond was not significant enough to allow for suit. **See Ch. 51, Discrimination Against Whites under Title VII, § 51.02 n.5.**

The First Circuit decides that a religious objector may not be required to pay union agency dues when those dues are used for purposes contrary to his religious beliefs. In *O'Brien v. City of Springfield*, the plaintiff, a Roman Catholic, objected to any of his agency fees going to the union because of the union's support of two organizations that were pro-choice and supported condom distribution in schools. The court ruled that requiring the plaintiff to pay the union agency fees over his objection was a failure to accommodate constituting religious discrimination. The court further held that it was not an undue hardship for the union to donate the plaintiff's agency dues to a mutually agreed upon charity. **See Ch. 56, Reasonable Accommodation, § 56.07[2] n.8.**

The Third Circuit has held that arbitration agreements not covered by the FAA may nonetheless be enforceable if valid under state law. In *Palcko v. Airborne Express, Inc.*, Palcko was a "transportation worker engaged in interstate commerce" and thus exempt from FAA coverage. However, the arbitration agreement specifically provided that should the FAA be inapplicable, Washington's arbitration law would apply. Stating that the FAA did not explicitly preempt state law, but rather left the parties in the positions they would be in if the FAA did not exist, the court concluded, "enforcement of the arbitration agreement between Palcko and Airborne under Washington state law, as if the FAA 'had never been enacted,' does not contradict any of the language of the FAA, but in contrast furthers the general policy goals of the FAA favoring arbitration." **See Ch. 77, Exhaustion or Election of Remedies; Issue Preclusion, § 77.02[2][c] n.51.**

An arbitration agreement shortening the statute of limitations and available remedies was held unconscionable in *Parilla v. IAP Worldwide Services VI, Inc.* The Third Circuit held that a requirement in the arbitration agreement that the employee present the employer with a discrimination claim within 30 days of the incident from which it arose was substantively unconscionable, as was a provision that required each party to bear its own costs and expenses, including attorney's fees. In contrast, a confidentiality provision was found not to be substantively unconscionable. **See Ch. 77, Exhaustion or Election of Remedies; Issue Preclusion, § 77.02[5][b][ii] n.147.1.**

The Fifth Circuit has applied the Supreme Court's Title VII ruling in *Desert Palace, Inc. v. Costa* to an ADEA case, holding that a plaintiff need not present "direct evidence" to obtain a mixed-motive jury instruction. In *Rachid v. Jack In The Box, Inc.*, the court observed that both Title VII and the ADEA prohibit discrimination because of a protected characteristic. The Supreme Court in *Desert Palace* had ruled that the mixed-motives analysis could be applied in circumstantial evidence cases because "[o]n its face, [Title VII] does not mention, much less require, that a plaintiff make a heightened showing through direct

evidence." Blending the proof models of *McDonnell Douglas* and *Price Waterhouse*, the court prescribed a "modified *McDonnell Douglas* approach" to be followed in these cases. **See Chapter 136, Mixed-Motive Cases under the ADEA, § 136.04[2][c] n.49.3.**

The Second Circuit has held that "interacting with others" is a major life activity under the ADA. In *Jaques v. DiMarzio, Inc.*, the court accepted "interacting with others" as a major life activity, but rejected "getting along with others" as too subjective. The court held that "a plaintiff is substantially limited in interacting with others when the mental or physical impairment severely limits the fundamental ability to communicate with others." **See Ch. 153, Qualified Individual with a Disability, § 153.06[1] n.8.**

The Third Circuit has ruled that employers must make reasonable accommodations for employees who are "regarded as" disabled. In *Williams v. Philadelphia Housing Authority Police Department*, the Third Circuit held that under the plain language of the ADA and the legislative history, employees who are "regarded as" disabled are entitled to reasonable accommodations for their impairments. The court also rejected the contention that a plaintiff "must show that there were vacant, funded positions whose essential functions the employee was capable of performing in the eyes of the employer who misperceived the employee's limitations," in order to prevail. The court noted that allowing employers to misperceive employees would render "regarded as" protection meaningless. **See Ch. 154, Prohibited Practices, § 154.03 n.2.**

The duty to accommodate under the ADA does not oblige an employer to meet with an attorney or rehabilitation counselor, according to the Seventh Circuit. In *Ammons v. Aramark Uniform Services Inc.*, the employer met with the employee and his union steward, and based on the information that the employee provided at this meeting, the employer determined that there were no reasonable accommodations that could be made for him. The court held that this meeting satisfied the employer's duty to engage in an interactive process and that the employer had no obligation to attend an additional meeting that was requested by the employee's counsel. "We find no support," the court stated, "for the conclusion that an interactive process must include an employee's counsel or other persons including a rehabilitation counselor." **See Chapter 154, Prohibited Practices, § 154.03 n.33.1.**

The ADA does not forbid personality tests. In *Karraker v. Rent-A-Center Inc.*, a federal district court in Illinois was asked to decide whether a personality test should be considered a "medical examination" for purposes of the ADA's prohibition against giving medical examinations prior to making a conditional offer of employment. While recognizing that the Minnesota Multiphasic Personality Inventory I (MMPI) is sometimes used in clinical settings as a tool for diagnosing mental illness, the court found that the employer in this case was scoring the test using a vocational protocol that did not identify psychiatric conditions. Since the purpose here was solely to discern personality traits, it should not be considered a medical examination, the court concluded. **See Ch. 154, Prohibited Practices, § 154.07[1] n.28.2.**

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