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Update on the Law

by Richard T. Seymour[1]

I. The Supreme Court's Decisions

Board of Trustees of University of Alabama v. Garrett, __ **U.S.** __, 121 S. Ct. 955, 148 L.Ed.2d 866 (2001), held 5 to 4 that the Eleventh Amendment bars private plaintiffs from suing State agencies under Title I of the ADA for monetary relief. The Court made clear that suits for injunctive relief are still permitted. Bottom line when our clients want monetary relief: Use State law if available, or else persuade the EEOC to sue.

Green Tree Financial Corp.-Alabama v. Randolph, __ **U.S.** __, 121 S. Ct. 513, 522, 84 FEP Cases 769 (2000), held that a consumer arbitration agreement was enforceable notwithstanding that it imposed on consumers an unliquidated and uncapped exposure to pay arbitral costs. "It may well be that the existence of large arbitration costs could preclude a litigant such as Randolph from effectively vindicating her federal statutory rights in the arbitral forum. But the record does not show that Randolph will bear such costs if she goes to arbitration. Indeed, it contains hardly any information on the matter. . . . The record reveals only the arbitration agreement's silence on the subject, and that fact alone is plainly insufficient to render it unenforceable. The 'risk' that Randolph will be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement. (Footnote omitted.) Bottom line: Discover what the potential costs are, and put into evidence these data and their effect on the plaintiff.

Circuit City Stores v. Adams, __ **U.S.** __, 121 S. Ct. 1302, 85 FEP Cases 266 (2001), held that § 1 of the Federal Arbitration Act excludes contracts of employment only for "schleppers," a Yiddish term that here means persons directly involved in the actual transportation of people and goods in interstate and foreign commerce. The decision does not affect any of the traditional defenses to arbitration occasionally available in particular cases: unconscionability, lack of consideration, absence of agreement, or excessive cost. Bottom line: Employees in the Ninth Circuit are now in the same boat as the rest of the country.

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I am grateful to my former firm, Lieff, Cabraser, Heimann & Bernstein LLP, for the assistance needed to prepare this paper. LCHB's web site is www.lchb.com.

I. Cases the Supreme Court Will Decide

Pollard v. E.I. DuPont de Nemours Company, cert. granted, __ **U.S.** __, 121 S. Ct. 756, 148 L. Ed. 2d 659 (**U.S.**, Jan. 8, 2001) (No. 00–763), will decide whether front pay falls within the caps on damages in the Civil Rights Act of 1991.

EEOC v. Waffle House, Inc., *cert. granted*, __ **U.S.** __, 121 S. Ct. 1401 (**U.S.**, March 26, 2001) (No. 99–1823), will decide the scope of the relief for an individual bound by an arbitration agreement for which the EEOC can sue, if any.

Equal Pay Act cases are expected to come up for Eleventh Amendment analysis.

I. 42 U.S.C. § 1981 Surprises

Wright v. Southland Corp., 187 F.3d 1287, 1297 n.12, 80 FEP Cases 1280 (**11th Cir.** 1999), which did not involve a claim under § 1981, stated in *dictum*: "Refusing to hire an individual on the basis of alienage is illegal under 42 U.S.C. § 1981 (1994)." (Citation omitted.) *Accord*, *Anderson v. Conboy*, 156 F.3d 167, 169, 77 FEP Cases 1278 (**2d Cir.** 1998), *cert. dismissed sub nom. United Brotherhood of Carpenters and Joiners of America v. Anderson*, __ **U.S.** __, 119 S. Ct. 2418 (1999) ("We hold that Section 1981, at least since the 1991 amendment, proscribes private alienage discrimination with respect to the rights set forth in the statute.").

Oden v. Oktibbeha County, __ F.3d __, 2001 WL 293511 (**5th Cir.** March 27, 2001), held that § 1981 does not create a cause of action for damages against a municipality or against a local official in his or her personal capacity, and that a plaintiff seeking damages from such defendants must sue under § 1983.

I. Interrelated Employers Under Title VII

Romano v. U-Haul International, 233 F.3d 655, 662–68, 84 FEP Cases 795 (**1st Cir.** 2000), affirmed the award on a jury verdict of $15,000 in compensatory damages and $285,000 in punitive damages (reduced from $624,000, to comply with the cap) against the Title VII defendant franchiser and franchisee, based on the "integrated enterprise" test developed under the NLRA. The court rejected the requirement of the Fifth and Tenth Circuits that a parent's "broad general policy" is not enough to support the "control prong," and that proof of day-to-day control is required, on the ground that it conflicts with the broad remedial purposes of Title VII. It followed the Second Circuit's "flexible" approach and held that plaintiffs are required only to show an amount of participation "'sufficient and necessary to the total employment process,'" even absent "'total control.'" *Id.* at 666. The court held that the parent's control over personnel operations was the most important factor, that the parent's involvement must be "proactive in order to be relevant," *id.* at 667, and that the lower court erred in instructing the jury that the parent's influence over advertising, the establishment of sales goals, and marketing as if these were equally relevant.

I. Actionable Conduct

A. Performance Appraisals

Rutherford v. Harris County, 197 F.3d 173, 184–85, 81 FEP Cases 1775 (**5th Cir.** 1999), held that a reasonable jury could have found that "Corporal Hartley subjected her to disparate treatment in the form of unfounded criticism of her accident reports." *Id.* at 185 n.12. The County relied in part on

these criticisms in denying a promotion, *id.* at 182, and there was evidence that they were in retaliation for the plaintiff's having rebuffed Sgt. Wells, Hartley's superior, in his sexual overtures to the plaintiff. *Id.* at 183.

Primes v. Reno, 190 F.3d 765, 80 FEP Cases 1345 (**6th Cir.** 1999), held that performance ratings of "fully successful" for a black Assistant U.S. Attorney were not adverse employment actions for purposes of a Title VII discrimination claim or retaliation claim, where there was no contention of any further action based upon these ratings, where unrebutted evidence showed that (1) the ratings were based on objective criteria fairly applied to the plaintiff, and (2) similar ratings were given at similar times to the majority of attorneys in his office, including whites. The court explained the reason for its holding, without mentioning these facts: "If every low evaluation or other action by an employer that makes an employee unhappy or resentful were considered an adverse action, Title VII would be triggered by supervisor criticism or even facial expressions indicating displeasure. Paranoia in the workplace would replace the prima facie case as the basis for a Title VII cause of action." *Id.* at 767.

Thomas v. Eastman Kodak Co., 183 F.3d 38, 47–55, 80 FEP Cases 537 (**1st Cir.** 1999), *cert. denied*, 528 **U.S.** 1161 (2000), held that the plaintiff's EEOC charge was not time-barred. She was selected for layoff within the 300-day charge-filing period, but the selection was based on allegedly biased evaluations she had received outside of the charge-filing period. The plaintiff had not previously been affected adversely by the evaluations; she informally complained about them to company officials (but did not file a formal internal complaint because of fear of retaliation), but her salary and raises did not differ significantly from those of other employees. *Id.* at 46. The court held that the period of limitations does not start running until the implications of the evaluation have crystallized and some tangible effects of the discrimination were apparent to the plaintiff. *Id.* at 50. The court relied in part on considerations of ripeness, stating that it is unwise to encourage lawsuits before the injuries are delineated, or even before it is certain that there will be injuries.

A. **Other Actionable Conduct**

Ribando v. United Airlines, Inc., 200 F.3d 507, 510–11, 81 FEP Cases 897 (**7th Cir.** 1999), involved a plaintiff who had been the target of a sexual harassment investigation. The court held that placing in her personnel file a letter of concern over her behavior was not an adverse employment action.

Simpson v. Borg-Warner Automotive, Inc., 196 F.3d 873, 876–78, 81 FEP Cases 850 (**7th Cir.** 1999), held that the plaintiff's voluntary reassignment to a nonsupervisory job, where the defendant engaged in no overt or covert activity to lead her to make the request and was offering her a potentially more congenial supervisory job, was not an adverse employment action.

Anderson v. Reno, 190 F.3d 930, 934, 937–38, 80 FEP Cases 1663 (**9th Cir.** 1999), accepted without discussion that a discriminatory failure to give the plaintiff female FBI agent needed support for her investigations was actionable under Title VII's prohibition of disparate treatment, in the context of a case that allegedly involved discriminatory denials of promotions and a discriminatory transfer that diminished the plaintiff's promotional opportunities.

I. **Disability**

Conclusory Descriptions of Disability: *Chanda v. Engelhard/ICC*, 234 F.3d 1219, 1222–24, 11 AD Cases 405 (**11th Cir.** 2000), held that, while plaintiff established that his work-related tendinitis was a physical impairment, he did not show that he had suffered a substantial limitation. While his

doctor said that he was substantially limited in the use of his forearm and wrist, the court held that this opinion had no probative value because it lacked specific facts substantiating its conclusions. Moreover, the court observed that the plaintiff's own testimony contradicted his doctor's conclusory statements.

Coverage of Temporary Help : On Dec. 27, 2000, the EEOC issued an Enforcement Guidance on the allocation of ADA responsibilities, between staffing firms and their clients, for the employees of the staffing firms. In some situations, it states, both can be liable to an employee of the staffing firm. The Guidance can be found in the EEOC COMPLIANCE MANUAL (BNA) at N:3317.

Regarded As Disabled : *Gorbitz v. Corvilla, Inc.*, 196 F.3d 879, 882, 9 AD Cases 1772 (**7th Cir.** 1999), held that there was no evidence that the defendant regarded the plaintiff as disabled. The plaintiff's frequent medical appointments were not by themselves sufficient to impute knowledge to the defendant, because physical therapy is often prescribed for those without substantial limitations in major life activities.

Intermittent Manifestations of Epilepsy : *EEOC v. Sara Lee Corp.*, 237 F.3d 349, 16 EDR 116 (**4th Cir.** 2001), held in the alternative that intermittent seizures were not a disability, where the seizures were themselves the disease in question, not merely intermittent manifestations of a continually disabling condition. It also held that the seniority system trumped the plaintiff's desired accommodation.

Job Restructuring: *Jay v. Intermet Wagner Inc.*, 233 F.3d 1014, 1017, 11 AD Cases 471 (**7th Cir.** 2000), held that the defendant had adequately accommodated the plaintiff by waiting four years for a nonclimbing millwright position at ground level—consistent with his permanent restrictions—to come open, rather than restructuring a job to allow him to resume working earlier.

I. The Federal Family and Medical Leave Act

Employees taking FMLA leave may be required to give adequate notice, and may be fired for failure to do so. *Gilliam v. United Parcel Service, Inc.*, 233 F.3d 969, 971–72, 25 EB Cases 1453, 6 WH Cases 2d 969 (**7th Cir.** 2000).

I. The Effect of *Reeves* in the Lower Courts

A. What is Enough to Defeat Summary Judgment or a Rule 50 JMOL Motion?

Blow v. City of San Antonio, 236 F.3d 293, 84 FEP Cases 1268 (**5th Cir.** 2001), reversed the grant of summary judgment to the Title VII racial discrimination defendant because the lower court's view of the facts—that the plaintiff applied too late to be considered for the promotion—was not the only view that could reasonably be taken. The plaintiff's evidence was to the effect that the decisionmakers were aware of the preference for City employees in selecting the person to fill a job vacancy, that a decisionmaker not only concealed the vacancy from her but actively discouraged her from applying, that the decisionmakers hired the first qualified white man they could find, and that she was encouraged to submit an application only after he had been selected. These actions were assertedly "an intentional and deliberate departure from stated policies" to prevent her promotion. The court held that, based on this evidence of the falsity of the defendant's explanation, the jury could draw the inference of racial animus:

> Blow's case presents us with a straightforward application of Reeves. On the record before us: The plaintiff has proved her prima facie case; she has presented sufficient evidence to

create a material issue of disputed fact as to whether the employer's explanation was false; and *there are no unusual circumstances* that would prevent a rational fact-finder from concluding that the employer's reasons for failing to promote her were discriminatory and in violation of Title VII.

(Emphasis supplied; footnote omitted.) Judge Emilio Garza dissented.

Bell v. E.P.A., 232 F.3d 546, 550, 84 FEP Cases 630 (**7th Cir.** 2000), reversing the grant of summary judgment on plaintiffs' promotional claims, cited *Reeves* as additional support for the proposition that "'evidence that calls truthfulness into question precludes summary judgment.'" (Citations omitted.)

Hinson v. Clinch County Board of Education, 231 F.3d 821, 831–32, 84 FEP Cases 309 (**11th Cir.** 2000), reversed the grant of summary judgment to the Title VII defendant because the plaintiff had shown strong evidence that each of the defendant's proffered justifications was pretextual, and a jury would be entitled to draw the inference of discrimination from the falsity of the reasons proffered.

Biased Remarks

Some Judges Just Do Not Get It: *James v. New York Racing Association*, 233 F.3d 149, 152–53, 84 FEP Cases 761 (**2d Cir.** 2000), affirmed the grant of summary judgment to the ADEA defendant, holding that the statement "that there were 'too many older supervisors and some of them needed to retire,'" and statements about "saving the NYRA for younger employees," *id.* at 152, were not evidence of age bias. Without any citation to the record, the court inferred that these were really references to the higher salaries of older employees, and that such remarks were therefore allowed: "Finally, in the context of the precarious financial position of NYRA, the remarks James proffered about saving NYRA for younger employees and about the need for older supervisors to retire clearly represented the hope that over time the older personnel would retire, and thereby reduce the high costs associated with more senior supervisory employees. Such concern with the elevated costs of senior employees does not constitute age discrimination." *Id.* at 153. For an equally head-in-the-sand approach, see *Williams v. Raytheon Co.*, 220 F.3d 16 (**1st Cir.** 2000).

But Most Do: *Russell v. McKinney Hospital Venture*, 235 F.3d 219, 226–29, 84 FEP Cases 941 (**5th Cir.** 2000), reversed the grant of judgment as a matter of law to the ADEA defendant. The court stated: "In light of the Supreme Court's admonition in *Reeves*, our pre-*Reeves* jurisprudence regarding so-called 'stray remarks' must be viewed cautiously." *Id.* at 229. It held that the age-biased remarks of a fellow manager, at the same level as the plaintiff, were probative of age discrimination because he influenced the decision. "If the employee can demonstrate that others had influence or leverage over the official decisionmaker, and thus were not ordinary coworkers, it is proper to impute their discriminatory attitudes to the formal decisionmaker." The cited with approval the decisions of other Circuits in "cat's paw" cases, and stated: "We therefore look to who actually made the decision or caused the decision to be made, not simply to who officially made the decision. Consequently, it is appropriate to tag the employer with an employee's age-based animus if the evidence indicates that the worker possessed leverage, or exerted influence, over the titular decisionmaker." Summing up, the court stated: "Age-related remarks are appropriately taken into account when analyzing the evidence supporting the jury's verdict (even if not in the direct context of the decision and even if uttered by one other than the formal decisionmaker, provided that the individual is in a position to influence the decision)." *Accord*, *Fisher v. Pharmacia & Upjohn*, 225 F.3d 915, 923, 83 FEP Cases 1445 (**8th Cir.** 2000) ("Stray remarks therefore constitute circumstantial evidence that, when considered together with other evidence, may give rise to a reasonable inference of age discrimination.").

When a Manager Laughs at a Biased Remark: *Chuang v. University of California Davis, Board of Trustees*, 225 F.3d 1115, 1128–29 (**9th Cir.** 2000), reversed the grant of summary judgment to the Title VII race and national origin discrimination defendant. The plaintiffs presented direct evidence of discriminatory motive to assist their inferential case under the *McDonnell Douglas* model, in addition to their exceptionally strong indirect evidence of pretext. The court accepted the evidence as adequate to show bias in the hearts of the decisionmakers, although it did not directly concern the failure to accord the plaintiff tenure. "First, a member of the Executive Committee, a decisionmaking body for the School of Medicine, Dr. Cross, reportedly stated in a meeting in 1989, just as Dr. Chuang was completing his prestigious five-year NIH Research Career Development Award, that 'two Chinks' in the pharmacology department were 'more than enough.'" The court stated that the term was "'an egregious and bigoted insult, one that constitutes strong evidence of discriminatory animus on the basis of national origin.'" It constituted direct evidence . . . Dr. Cross's remark establishes discriminatory intent even though it was uttered during consideration of a different Asian-American's potential employment. . . . after the hiring decision."). Moreover, it implicates not only the speaker. For purposes of summary judgment, Dean Williams's laughing response to this remark establishes adequate evidence of discriminatory intent on his part also." The court strongly rejected the lower court's rationalization for a second biased remark: "It is not the province of a court to spin such evidence in an employer's favor when evaluating its motion for summary judgment. To the contrary, all inferences must be drawn in favor of the non-moving party."

When a Manager Is Silent in the Face of a Biased Remark by a Co-Worker: *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 156 F.3d 581, 588–89, 77 FEP Cases 1699 (**5th Cir.** 1998), *vacated on grant of reh'g en banc*, 169 F.3d 215, 79 FEP Cases 1770 (**5th Cir.** 1999), *reinstated in relevant part*, 182 F.3d 333, 80 FEP Cases 704 (**5th Cir.** 1999), held that the manager's silence in the face of the remark wass evidence of the manager's discriminatory intent.

Not Every Plaintiff Will Benefit: *Smith v. Leggett Wire Co.*, 220 F.3d 752, 83 FEP Cases 980 (**6th Cir.** 2000), reversed a jury verdict for $100,000 in a racial discrimination discharge case under Kentucky law. The defendant urged that it fired the plaintiff because he had admittedly threatened to kill some persons at the defendant's plant if his incentive-pay problems were not resolved. The court held that evidence of a limited number of racial slurs, racist cartoons, and racist stories, involving persons other than the decisionmaker, over the preceding twenty years were not sufficient to show pretext. Indeed, it was reversible error to have admitted them into evidence. It also held that plaintiff's comparators were not proper, because the decisionmakers and conduct were different.

If Material Facts Are Subject to Two Interpretations, No Summary Judgment: *Blow v. City of San Antonio*, 236 F.3d 293, 84 FEP Cases 1268 (**5th Cir.** 2001); *Adams v. Ameritech Services, Inc.*, 231 F.3d 414, 428, 84 FEP Cases 178, 25 EB Cases 1101 (**7th Cir.** 2000).

Effect of Impeaching the Defendant's Credibility as to Fewer Than All Justifications: *Hudson v. Norris*, 227 F.3d 1047, 1051–52 (**8th Cir.** 2000), a retaliation case, used the defendants' proffer of some false justifications to help show the causal link between the protected testimony and the adverse actions, as well as to show that the justifications as a whole were pretextual.

Tyler v. RE/MAX Mountain States, Inc., 232 F.3d 808, 814 (**10th Cir.** 2000), stated that a plaintiff must generally proffer evidence showing that each of the defendant's stated justifications is pretextual, but held that there are exceptions:

> However, like other circuits, we are unwilling to apply that rule as rigidly as RE/MAX would like, recognizing that when the plaintiff casts substantial doubt on many of the employer's multiple reasons, the jury could reasonably find the employer lacks credibility. . . . Under those

circumstances, the jury need not believe the employer's remaining reasons.

Accord, *Stanziale v. Jargowsky*, 200 F.3d 101, 106 n.4, 81 FEP Cases 1440 (**3d Cir.** 2000) ("the relevant, case-by-case inquiry is whether the employer's lack of credibility as to some of the proffered reasons so seriously undermines its credibility that a factfinder could reasonably disbelieve all of the employer's proffered reasons").

The Evidence to Be Considered on Motions for Summary Judgment or Judgment as a Matter of Law: *Russell v. McKinney Hospital Venture*, 235 F.3d 219, 84 FEP Cases 941 (**5th Cir.** 2000), reversed the grant of judgment as a matter of law to the ADEA defendant. The court rejected the defendants' argument that two nurses who were defense witnesses could be considered "disinterested" because they "no longer worked for Homecare during the time of the trial." *Id.* at 225 n.8. The court stated: "In addition, Russell produced evidence at trial that Homecare dominated the healthcare market, thus casting doubt upon defendants' contention that the nurses were 'disinterested' witnesses." *Id.* at 224–25.

Kinserlow v. CMI Corp., 217 F.3d 1021 (**8th Cir.** 2000), a personal-injury case, cited *Reeves* for the proposition that the court should not weigh the evidence and should give weight only to uncontradicted and unimpeached evidence of the movant, to the extent that it came from disinterested witnesses. The witnesses the court found to be disinterested were employed by companies who were not parties.