
WORKPLACE UPDATE®

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DISCRIMINATION CASES

EEOC SUES FOR RELIEF FOR PARTNERS IN LAW FIRM

The EEOC has filed suit against one of the largest law firms in the United States, Sidley Austin Brown & Wood, claiming that the firm discriminated on the basis of age against some of its older partners. Normally, partners are not considered employees under the Age Discrimination in Employment Act (ADEA) and there would be no basis to bring suit on their behalf under the ADEA against their firm. However, here, the EEOC claims that a significant number of partners who had worked at the Sidley firm since at least 1978 were not in fact partners as they had a minimal role in running the firm. Thus, the EEOC claims that the firm's practice of setting a mandatory retirement age for those partners violated the ADEA. The EEOC is seeking unconditional reinstatement for those partners who were terminated under the retirement plan and "economic relief," which some have estimated could exceed \$30 million dollars. According to the EEOC attorneys handling the case, the partners on whose behalf the suit was brought averaged about \$500,000 a year. The EEOC attorney indicated that, "there was a very, very small self-perpetuating group (of partners) at the top...and nobody but nobody had any power or authority anywhere else in the firm." *U.S. EEOC v. Sidley Austin Brown & Wood, C.A. No. 05-C-0208.*

NINTH CIRCUIT UPHOLDS DIFFERENT MAKEUP REQUIREMENTS FOR FEMALES

The Ninth Circuit Court of Appeals, the most liberal circuit in the country in employment cases, has ruled that Harrah's Casino in Nevada did not discriminate against a female bartender by requiring females to wear makeup. The plaintiff claimed that this requirement, which was not made of men, imposed a more stringent standard on women which was both expensive and time consuming. She argued that under the Supreme Court's ruling in *Price Waterhouse v. Hopkins*, an employer cannot take adverse action against a person based on sex stereotypes. In a 2-1 decision, the Court rejected this argument and applied an analogy to airline cases where the court has upheld an airline's right to impose different weight standards on flight attendants. In the airline cases, a balancing test is applied to determine if the requirement imposes an unequal burden on females. Here, according to the Court, the plaintiff had not shown that the cost or time on female bartenders to comply with the makeup rule presented such an unequal burden. *Jespersen v. Harrah's Operating Co.*, 9th Cir., No. 03-15045 (12/28/04).

ADR

**NBA BASKETBALL PLAYERS
OBTAIN RELIEF**

In November 2004, a brawl broke out at a game between the Detroit Pistons and the Indiana Pacers which culminated in a fight in the stands and on the playing floor between players and fans. As a result of the fracas, NBA Commissioner David Stern imposed various penalties on the players, including a 25 game suspension on Indiana Pacer Jermaine O'Neal. The National Basketball Players Association challenged the suspension and sought to arbitrate the matter under the Collective Bargaining Agreement. The NBA refused to arbitrate, claiming that the dispute was not arbitrable because the Commissioner had complete discretion with respect to conduct "on the playing court." The union went to arbitration without the NBA and the arbitrator ruled that he had authority to consider the matter and he reduced O'Neal's suspension to 15 games. The NBA filed suit in federal court in New York to set aside the arbitrator's decision, but that court upheld the ruling, finding that the conduct in question here "falls into the category of violence off the court" and therefore the Commissioner did not have complete discretion of the matter. The court found that "fighting with or striking a fan has never been characterized as conduct on the playing court." O'Neal's conduct here which involves shoving an arena employee and punching a spectator falls into the category of "violence off the court" and thus the arbitrator had authority to review the suspension. *National Basketball Ass'n v. National Basketball Players Ass'n*, S.D.N.Y., No. 04 Civ. 9528 (12/30/04).

INDIVIDUAL RIGHTS

ONE TOAST TOO MANY

Stephanie LaCross was hired by Cornerstone Christian Academy of Lafayette as a teacher. On her employment application, she answered "no" to the question "Do you use alcoholic beverages?" and signed the application under a statement which indicated that "falsification may be cause for dismissal." In celebration of her hire, LaCross went out with some friends and drank a few beers. The school found out about this and fired her. LaCross sued for breach of contract and the district court awarded her \$50,000. A Louisiana Court of Appeals reversed that ruling and issued a judgment in favor of the academy. The Court noted that the school was dedicated to certain principles, including one against the consumption of alcohol. LaCross had applied for the job on the pretense that she did not consume alcohol and she affirmed that this was a truthful answer. Her celebratory binge established that this was not a truthful answer. She was terminated for falsifying her application. The academy, according to the Court, "had a right to select its employees according to these standards and to dismiss them for failing to meet them." *LaCross v. Cornerstone Christian Academy of Lafayette, La. Ct. App.*, No. 04-341 (12/15/04)

**VICTORIA'S SECRET — NOT YOUR
AVERAGE DEPARTMENT STORE**

An executive with Foley's Department Store, a division of the May Department Store chain, signed an employment contract which included a non-competition clause covering the duration of his employment

plus two years. The clause prohibited him from, among other things, working for a competing business, defined as any retail department store, specialty store, or other retail business that sold goods and merchandise of the types sold in May's retail stores. The executive was offered a position with Victoria's Secret and he filed for a declaratory judgment to determine if the non-competition clause would cover his employment with that chain. The district court in Missouri held, and the Missouri Court of Appeal affirmed, that the executive would not violate the agreement by going to work for Victoria's Secret because Victoria's Secret was not a competing business, even though May's department stores sells some of the goods sold by Victoria's Secret. On the one hand, Victoria's Secret sells intimate apparel targeted at young women "who are willing to pay higher prices for the Victoria's Secret premium brand." On the other hand, May's department stores are more traditional department stores that sell a broad array of products of which intimate apparel constituted only about 3% of sales. May's core customers were women between 40 and 50 years of age. Thus, according to the court, simply because some of May's sales included the same goods as Victoria's Secret, it did not make the two competitors. The court compared the two stores to a Ritz Carlton and a Motel 6, both of which offered lodging, but which did not compete with each other for the same customers. In a similar vein, Mortons of Chicago, a steakhouse, and McDonalds both sold food, but they were not appealing to the same consumers. *Weikel v. May Department Stores Co.*, Mo. Ct. App. No. ED 83916 (12/21/04).

ADA

**OFFICE ITCH WON'T
MAKE YOU RICH**

An office worker in Washington, D.C. suffered from an allergy known as "idiopathic pruritus," a skin condition which caused an itching sensation. The employee had such an attendance problem that he was ultimately given a final warning and terminated by his employer because of poor attendance. The worker claimed that the air quality in his office was so bad that it exacerbated his skin condition so that he could not sleep at night and this led to his attendance problems. He sued under the ADA claiming that he had a condition which interfered with the major life activity of sleeping and that his employer had failed to accommodate his condition. The district court and the D.C. Court of Appeal rejected the claim, finding that if he could avoid the itching problem by moving to a new office location, then he was not "substantially limited" in the major life activity of sleeping. *Haynes v. Williams*, D.C. Cir., No. 03-7134 (12/17/04).

LABOR NOTES

A NEW SUPER UNION?

The United Steelworkers of America and the Paper, Allied Industrial, Chemical and Energy Workers (PACE) unions have agreed to merge. The combined membership will number some 850,000 members. The Steelworkers have 575,000 active members, while Pace has 275,000. The new union will be called the United Steel, Paper and

Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union. PACE President Boyd Young said of the merger: “We believe we’re creating the most powerful union in the world.” Special classes will be held to teach the members the name of the new union.

SUPERVISOR’S ACTIONS TAINT ELECTION

The National Labor Relations Board (NLRB), in a 3-2 ruling (the majority being Republican appointees) has held that a supervisory nurse who solicited employees to sign union authorization cards and a pro-union petition, encouraged them to attend union meetings and to vote for the union, told them they would lose their jobs if the union did not win the election, put up pro-union signs in the workplace and wore a union pin, had tainted the election won by the union, which required that the election be overturned. The case illustrates the turns in the road a case can take when the makeup of the NLRB changes with a change in administration. The case was originally decided by the Board in February 1999 where the Clinton-dominated Board upheld the election. That ruling was overturned by the Sixth Circuit Court of Appeal in October 2000 and remanded to the NLRB. During the interim, President Bush appointees took over as a majority on the Board which led to the present 3-2 decision overturning the election. In so ruling, the Board established as a standard that an election must be overturned if the supervisor’s conduct reasonably tended to have a coercive effect on employees and was likely to impair their freedom of choice in the election. *Harborside Healthcare Inc.*, 343 N.L.R.B. No. 100 (12/08/04).

LYING ABOUT CRIMINAL BACKGROUND WARRANTS TERMINATION

In the midst of a decertification election among Overnite Transportation employees represented by Teamsters Local 667, thieves broke into Overnite’s Memphis facility and stole thousands of dollars worth of merchandise. The company suspected that employees were involved in the theft and initiated background checks on employees hired before 1997 when the company began doing background checks on applicants. Seven employees and one supervisor were terminated for failure to disclose their criminal records on their applications. The crimes included convictions for manslaughter, rape, drug possession, and unemployment fraud. Teamsters Local 667 filed unfair labor practice charges claiming that the true reason the employees were terminated was because of their union activities. An administrative law judge ruled against the company, but the NLRB, in a split ruling, set aside the ALJ’s ruling and held that the company’s decision to terminate the employees was consistent with its past practice, that the company had shown that it had a zero tolerance policy for application falsification and that it had followed that policy in an even-handed manner. Dissenting member Walsh issued an opinion that the terminated employees had legitimate explanations for their failure to disclose their convictions and that the ALJ should have been upheld. *Overnite Transportation Co.*, 343 NLRB No. 134 (12/16/04).

OFCCP

EO SURVEYS SENT OUT

The Office of Federal Contract Compliance Programs (OFCCP) which monitors compliance by government contractors with Executive Order 11246 and various laws has sent out approximately 10,000 equal employment (EO) surveys to government contractors. The surveys by and large were sent to contractors which had not been solicited the previous year or which were otherwise excepted. The surveys were developed to predict those contractors most likely to be in non-compliance with Executive Order 11246 because of systemic discrimination. The surveys have not been established to show this and the OFCCP is still evaluating the potential correlation between the survey data with systemic discrimination. Nonetheless, it is requiring contractors to complete and return the surveys by the end of March 2005.

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