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## LABOR UPDATE

### *Recent Developments in Labor and Employment Law*

#### **SUPREME COURT UNANIMOUSLY HOLDS FOR JOB BIAS CLAIMANTS**

In a decision that lowers evidentiary hurdles for discrimination plaintiffs, all nine justices of the U.S. Supreme Court have that claimants need not always present direct evidence of intentional discrimination in order to prevail in a job bias suit. This decision will not only benefit plaintiffs by easing their burden of proof, but it will penalize employers who fail to credibly articulate and support their asserted reasons for challenged job actions.

The subject case concerned Mr. Robert Reeves, who was fired from his supervisory position with a plumbing products company after 40 years of service. Reeves (then 57) and his own supervisor (45) were terminated jointly because of production shortfalls purportedly attributed to poor employee attendance, which these supervisors allegedly failed to monitor, record and remedy. However, a third supervisor in his mid-thirties was not terminated, even though he shared responsibility for maintaining accurate attendance records along with the other two.

Reeves sued for age discrimination and won his case at trial, where he introduced evidence (e.g., time cards, work orders for faulty time clocks, supporting testimony, etc.) that his employer's reason for his firing was false. He further demonstrated that the company official who made the decision to terminate his employment had shown "age-based animus" when dealing with Reeves, albeit not in connection with his termination.

Nevertheless, the jury's verdict for Reeves was reversed on appeal. The court of appeals held that Reeves was required, but ultimately failed, to affirmatively prove that age motivated his firing. Although it acknowledged that certain age-related comments by the company decision-maker were "potentially damning," it discounted these comments on the ground that they were

not made in the direct context of Reeves' termination. Without any such "direct" evidence of discrimination, the court held that Reeves' evidence disproving his employer's stated reason for his firing could not support a judgment that he was actually fired because of intentional discrimination.

The Supreme Court reversed the court of appeals and reinstated the jury's verdict which awarded Reeves \$70,000 in damages, \$28,490 in back pay, and undetermined attorney's fees. In so doing, the Court held that despite Reeves' lack of direct evidence, his "substantial" evidence discrediting his employer's stated reason for his firing was sufficient to allow the jury to conclude that discrimination was the true motivation for its action. The Court stated, "Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive."

Although the Court was careful to stress that discrimination liability must stem from more than the mere disbelief of an employer's reason and ultimately must derive from belief in the employee's explanation of intentional job bias, employers should take heed that rejection of their stated reasons for an action can permit a court or jury to "infer" the ultimate fact of intentional discrimination. Now more than ever, employers should be careful that their reasons for particular job actions are accurate, capable of withstanding intense scrutiny, and, wherever practicable, adequately supported by competent, documentary evidence. *Reeves v. Sanderson Plumbing Products, Inc.*, No. 99-536 (June 12, 2000).

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## **DRESS DOWN DAYS BECOMING MORE POPULAR**

According to the 1999 National Workplace Survey by Jackson Lewis, more than 70 percent of companies have 'dress down days.' One third of companies responding to the survey stated they allow casual attire everyday. Two thirds of the respondents limit casual attire to one day per week. The survey also revealed that while 40 percent of companies found 'dress down days' to have a positive effect on employee morale, relaxed attire can result in an overall laxness in workplace behavior. Almost one half of those surveyed have observed an increase in tardiness and absenteeism. Furthermore, 30 percent found a rise in flirtatious behavior.

Employers should monitor workplace behavior to ensure that casual dress does not lead to reduced professionalism. Employers should consider formulating a dress code policy for casual days so that upper level management does not have to monitor everyone's style of dress. Employees should be told that management retains the right to eliminate or modify the casual dress policy at any time if in management's sole discretion the policy is leading to decreased productivity and professionalism. Clear policy guidelines can eliminate or reduce the need for management scrutiny of subordinates' attire. Points to consider in formulating a policy include: 1) what level of casual dress is acceptable; 2) appointment of a committee of upper level and lower level employees to formulate a proposed policy; 3) what level of casual dress is expected by or will be acceptable to your customers; 4) the establishment of clear guidelines for acceptable dress including examples of what is acceptable and what is not; and 5) explanations

for why certain attire is inappropriate for casual day.

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### **THE DUTY OF BUYERS OF A BUSINESS TO BARGAIN WITH AN EXISTING UNION**

Purchasers of an existing business often have a duty to bargain with the union that represented the employees prior to the purchase. In *N.L.R.B. v. Advanced Stretchforming Intern., Inc.*, the buyer purchased only the assets of a bankrupt aerospace manufacturing firm. The employees of the former business were terminated as a condition of the sales contract. The new owner, ASI, then told the former employees to report to the plant shortly after the sale to be interviewed for positions with the new firm. ASI refused to honor the collective bargaining agreement in place between the prior owners and the UAW. ASI hired eight of the seventeen former production workers at different rates of pay and for different benefits. The court of appeals ruled that an unfair labor practice had been committed. Typically, when a new employer buys a business, it is free to set the initial terms and conditions of employment without being bound by the old owner's collective bargaining agreement with a union. But if the new ownership conducts essentially the same business as the old owner and uses the same employees or would have used the same employees but for anti-union animus, the new employer has a duty to recognize and bargain with the union.

The court stated "if a majority of the employees in the unit were in the unit before the purchase, there is a duty to bargain" because it is assumed that the holdover majority still wants union representation. The duty to bargain with an existing unit often will not become apparent until after the new owners have completed the hiring process. If it turns out that a majority of the employees hired by the new owners were employed by the old ownership and were members of the bargaining unit, then the duty to bargain with the union will arise. In short, new owners have a right within certain bounds to step in and make changes to wages and benefits. But these changes may have to be reconsidered if the new workforce is substantially the same as the workforce for the former employer. New owners need to be careful about what statements are made during the hiring process, especially if the person being interviewed used to work for the old employer and was a member of the union. If the new owners intend to hire the old workforce for the new enterprise, then it is best to carefully consider any desire to change wages or benefits. Failure to do so could lead to an unfair labor practice charge.

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### **EMPLOYER HELD NOT LIABLE FOR LOSS OF AFFECTIONS**

An Illinois court has ruled that an employer was not responsible for the fact that the president of its board of directors caused the break-up of an employee's marriage. William and Susan were married in 1970. In 1992, Susan began working for Southwestern Electric Cooperative (SEC). Allan was president of SEC's board of directors and took several business trips with Susan, acquiring, in the words of the court, "an improper and undue influence over

her.” Eventually, Susan and William divorced. William filed suit against Allan and SEC seeking to recover the amount of his former wife’s salary as damages. The court ruled for SEC and held that SEC could not be liable for what Allan had done because William had failed to show that Allan’s actions in wooing Susan were part of Allan’s job duties.

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## **AUTOMATIC RENEWAL OF EMPLOYMENT CONTRACTS IN ILLINOIS**

Recently, the Illinois Legislature passed the “Automatic Contract Renewal Act.” The act is effective June 1, 2000 and applies to any written agreement entered into between two or more individuals or other legal entities except for the federal government, the State of Illinois, local government, or school districts. Under the act, if a contract is subject to automatic renewal, the clause setting forth the automatic renewal provision must appear in the contract in “a clear and conspicuous manner.” The act does not define the phrase “clear and conspicuous.” If a contract’s automatic renewal provisions are not clear and conspicuous, then the contract will not automatically renew. The act does not apply to contracts entered into before June 1, 2000.

Employers will need to review any written employment contracts as well as non-compete and confidentiality agreements for any automatic renewal language. If a contract renews on or after June 1, 2000, then the automatic contract renewal provisions will have to be modified to comply with the act. Until the courts provide guidance about what constitutes “clear and conspicuous” language that satisfies the act, some ways to try to meet the “clear and conspicuous” standard would be the use of bold print for the contract renewal provision in large type along with an acknowledgement line for the employee to sign indicating that he or she understands that the contract is subject to automatic renewal.

## **QUOTABLE**

"I have not failed. I've just found 10,000 ways that won't work."

- Thomas Alva Edison (1847-1931)

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