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Weekly Employment Brief

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U.S. Supreme Court Blocks ADA Claims By State Employees

The U.S. Supreme Court limited the reach of the Americans With Disabilities Act (ADA), ruling that state employees cannot file employment-discrimination lawsuits against their employers under this federal disability rights-law. In *University of Alabama Board of Trustees v. Garrett*, two state employees filed suit against their respective state employers for discrimination based on their disability and for refusing to reasonably accommodate them. Citing the states' 11th Amendment immunity against being sued in federal court, the Supreme Court barred the employees' suits. The ADA joins the Age Discrimination in Employment Act (ADEA) as the second federal employment discrimination law that the Supreme Court has ruled unavailable to state employees.

Titles Without Substance May Subject Employers To Overtime Law Penalties

Handing out employee titles without substance is at issue in a wave of recent class action suits, including one currently in Santa Clara Superior Court. Plaintiffs in *Mohsin Mynaf v. Taco Bell* are asking for overtime pay and damages claiming that their employer promoted hourly employees to assistant manager slots simply to avoid paying overtime. The problem, plaintiffs contend, is that the promoted employees continue to perform the same tasks as hourly employees. Under California law, "executive" employees are exempt from overtime compensation if they have discretionary authority over employees, regularly supervise at least two workers, and spend more than 50 percent of their work time devoted to "managerial duties." A title alone is irrelevant.

Court Holds Dating Co-Workers Not Protected

Can an employer terminate an employee for dating a co-worker? The Second Circuit answered in the affirmative in *McCavitt v. Swiss Reinsurance America Corporation*. In that case, an officer of the defendant corporation was passed over for promotion and then fired because of a romantic involvement with another unmarried company officer. Although the corporation had no written antifraternization policy, and despite warning that its decision may doom most workers "to the life of a Trappist monk," the Second Circuit held that romantically dating a co-worker is not protected legal recreational activity outside work hours under a New York law. In California, the question of whether an employer may lawfully restrict off-hour fraternization is unanswered. However, California has an analogous law, which prohibits an employer from demoting, suspending, or discharging an employee for "lawful conduct occurring during non-working hours away from the employer's premises." Although by no means conclusive, a California court could interpret this statute in a similar manner by allowing employers to restrict off-duty dating. However, until the issue is resolved, California employers are well advised to refrain from considering an employee's lifestyle or non-work activities when making work decisions.

Watch Your Recruiting Methods

Employers, watch what you say to your recruits! In *Schism v. U.S.*, the court held that the government's promise for free lifetime health care to military enlistees, stated as part of its recruiting efforts,

created an implied-in-fact contract for those benefits. The government then breached the contract in 1956 when Congress passed a law imposing space-available limitations on medical care. Now, a pending lawsuit brought by military retirees for lifetime health care could cost the government billions of dollars in damages. This case illustrates that employers should not be overzealous in recruiting efforts and should carefully monitor promises made to recruits.

Workers File Suit Under ADEA For Giving "Grades" To Employees

A pending case illustrates that fair "grade" are important even after school. Nine workers at Ford Motor Company filed a multi-million-dollar age discrimination suit challenging the company's employee evaluation process for its managers. Ford's evaluation policy is similar to the scholastic practice of grading students on a curve in that 10 percent of employees receive A's, 80 percent get B's and 10 percent get C's. Those who get C's are not eligible for a raise or bonus, and a C grade for two consecutive years is grounds for demotion or termination. The employees allege that Ford uses the system to get rid of older workers.

DOL Extends Deadline For Filing Of EO Surveys

The Department of Labor (DOL) extended federal contractors' deadline for completion of their Equal Opportunity surveys to April 23. The Office of Federal Contract Compliance Programs (OFCCP), a division of the DOL, sends surveys to federal contractors and subcontractors asking for detailed information on: the compensation and tenure of full-time employees; personnel activities such as hires, promotions and terminations; and general information about the establishments' current affirmative action programs. The survey was included in regulations setting out affirmative action mandates for federal contractors and subcontractors under Executive Order 11246.