

**U.S. Supreme Court Holds that Established Seniority Rules Ordinarily Trump the ADA**

In a favorable case for employers, the U.S. Supreme Court recently ruled that when an employee's requested accommodation under the Americans with Disabilities Act conflicts with an employer's established seniority system, the requested accommodation ordinarily is not "reasonable" unless the employee can make a showing of special circumstances. In *US Airways v. Barnett*, an airline cargo handler invoked his seniority rights to transfer to a less physically demanding position in the mailroom to accommodate his back injury. Approximately two years later, the employee learned that at least two employees senior to him intended to bid for his mailroom position. The employee asked US Airways to accommodate his disability by allowing him to remain in his position in the mailroom. US Airways allowed the employee to continue working in the mailroom for five months while it considered the matter, but ultimately concluded that it would not make an exception to its seniority system. As a result, the employee lost his job and then sued. In addressing the employee's claim under the ADA, the U.S. Supreme Court held that it ordinarily would be "unreasonable" to require an employer to provide an employee with a job assignment that violates the employer's valid seniority system unless the employee can show that particular special circumstances make the assignment reasonable. For example, the Court held that a proposed accommodation might be reasonable if an employee could show that the employer retained the right to change the seniority system unilaterally and frequently exercised that right, thereby reducing employee expectations that the system would be followed. Although this case reinforces the rights of employers to rely on established seniority systems to make employment decisions, companies with employees who seek a reasonable accommodation of their disabilities should continue to make individualized assessments and engage in the interactive process in good faith with those employees.

Federal Court Narrows Privilege Exception to Freedom of Information Act

In a decision that broadly interprets the disclosure requirements of the Freedom of Information Act (FOIA), a U.S. Court of Appeals has held that a federal agency must produce certain documents that it argued were protected by the attorney work-product privilege. The State of Maine sought documents from the U.S. Department of the Interior for use in the state's litigation with third parties. The U.S. Court of Appeals for the First Circuit rejected the Department of Interior's claim that the documents were protected from disclosure, because the court found the documents were not created "primarily for litigation," but were created for a "dual purpose" and not for a particular litigation. The court held that shielding such "dual purpose" documents would defeat FOIA's purpose of opening government decision-making to the public. Employers should be aware of this decision, because many

employers routinely provide federal agencies, such as OFCCP and EEOC, with a variety of documents, including reports, forms and general correspondence. The federal agency receiving the employer's documents may have to release copies of those documents if it receives a FOIA request from other parties subsequently involved in litigation with the employer. Employers should carefully scrutinize information they provide to the government, and should properly identify the privileged or confidential nature of any documents that they do not want subsequently released by a federal agency in response to a FOIA request.

Employee Disciplined for Conversations on Her Home Telephone Held to Have a Right to Sue

A bank employee who was disciplined for talking about her employer during a telephone conversation on her home telephone can proceed with her lawsuit for wrongful discharge, invasion of privacy and wiretap violations, according to the New Hampshire Supreme Court. In *Karch v. BayBank FSB*, two unnamed individuals apparently overheard the employee's telephone conversation while using a radio scanner for amusement. After hearing the employee mention the bank, the two individuals apparently reported the conversations to a vice president of the bank, who allegedly threatened to discharge the employee and gave her a written warning because of her comments. The employee eventually resigned, citing a hostile environment, and subsequently sued the bank, the vice president, and the unnamed individuals. The New Hampshire Supreme Court held the employee can maintain claims for constructive discharge, invasion of privacy and unlawful wiretapping against the bank and the bank vice president. This case reinforces the message that employers should focus only on work-related conduct when enforcing work rules. This is particularly true for California employers, because the California Labor Code expressly protects an employee's rights to engage in lawful off-duty conduct.

No Violation of Employee's Right to Freedom of Association, Where the Association is Not a "Substantial or Motivating Factor" in the Employer's Decision to Demote

The Ninth Circuit Court of Appeals recently held that a sheriff's department did not unlawfully interfere with a sheriff's First Amendment freedom of association rights where the sheriff's department investigated a sheriff's association with ex-felons in violation of the department's rules. The Nevada Sheriff's Office began an investigation of sheriff John Strahan's involvement with a motorcycle club called "Blind Justice" after receiving information that Strahan's associates included ex-felons and that Strahan had violated the department's rules by not informing it of this fact. After changing internal investigators, at least partly because Strahan complained that the original investigator was violating his freedom of association rights, the department ultimately demoted Strahan for violations of departmental policies unrelated to the motorcycle club. Strahan

eventually resigned from the department and brought suit in federal court. The Court of Appeals upheld the lower court's grant of summary judgment in favor of the department, holding that an employee must show that the employee's activity protected under the First Amendment was a "substantial or motivating factor" in the employer's adverse employment decision. The department's knowledge of Strahan's associational activities without more, such as evidence that the demotion quickly followed the department's acquisition of this knowledge, was insufficient to maintain Strahan's retaliation suit. While the employer prevailed in this case, it underscores the importance of basing all employment decisions on legitimate criteria, and the value of having records that reflect this.