FENWICK & WEST LLP

Weekly Employment Brief

October 28, 2002

Howard Wang Contributor 650.858.7176
Trey Wichmann Co-Editor 650.858.7813
Shawna Swanson Co-Editor 415.875.2487

Florida Court Holds Cyberspace Not Covered By ADA

A Federal district court in Florida has ruled that the Americans With Disabilities Act (ADA) applies only to physical spaces and not to the Internet. In *Access Now v. Southwest Airlines,* a disabled-rights organization attempted to compel Southwest Airlines to redesign its Website to make it accessible to the blind. Access Now argued that the "virtual ticket counter" at southwest.com was a "place of public accommodation," which Title III of the ADA requires to be accessible to people with disabilities. The organization contended that Southwest's site was not programmed to be compatible with assistive technologies, such as screen readers, to allow blind users to navigate the site. However, the court found that, based on the plain language of the ADA and the interpretive regulations, the ADA applies only to concrete, physical spaces and not to the Internet. The court explained that to expand the ADA to cover "virtual" spaces like the Internet would "create new rights without well-defined standards." Specifically, the court determined that there are no generally-accepted standards for programming websites to make them uniformly compatible with assistive software. With an increasing number of companies offering a wide variety of goods and services over the Internet, there are concerns that certain segments of the population are being denied access to this virtual marketplace. These concerns are driving advances in assistive technology, but they ultimately may lead Congress to amend the ADA to cover the Internet as well.

Third Circuit Upholds Exclusion of EEOC Determination Letter

A Federal appellate court has upheld the trial court's exclusion of an EEOC determination letter that found "reasonable cause" to believe that Home Depot had discriminated against a woman because of her sex and race. In *Coleman v. Home Depot, Inc.*, Mary Coleman claimed the home improvement chain denied her a sales position and relegated her to a cashier job because she was a black woman. The EEOC's determination letter stated Ms. Coleman was "highly experienced" in sales and that women at Home Depot had "systematically" been placed in cashiers' positions and not given the opportunity to advance into sales positions. The trial court excluded the determination letter because the evidence at trial showed she actually had little relevant sales experience. The Third Circuit Court of Appeals (encompassing Pennsylvania, New Jersey, Delaware and the U.S. Virgin Islands) upheld the exclusion of the letter, finding its minimal probative value to be substantially outweighed by the fact that Home Depot would have had to put on extensive, time-consuming evidence to rebut the EEOC's finding of systemic discrimination. While a victory for the employer in this case, California employers should be aware that the Ninth Circuit has established a per se rule that the probative value of EEOC determination letters always outweighs any prejudicial impact.

Waitress' Sexual Harassment Complaint Can Proceed Against Both the Mustard and the Fog

A California Court of Appeal has rejected San Francisco's Fog City Diner's efforts to distance itself from a sexual harassment suit involving the upscale Napa County restaurant, Mustard Grill. In *Nelson v. Fog City Diner,* a hostess at the Mustard Grill filed a retaliation suit alleging she was fired for complaining that her supervisor sexually assaulted her in her home. Nelson also sought to hold Fog City Diner responsible for the alleged harassment, suing the Diner under an "integrated enterprise" theory of liability, claiming the same corporate entity owned and operated the two restaurants. As evidence, Nelson pointed to corporate changes she claimed Fog City Diner orchestrated in anticipation of litigation to escape liability. In addition, Nelson's pay stubs and federal tax forms listed the former name of the Fog City Diner as her employer. Although the trial court granted summary judgment in favor of Fog City Diner despite such evidence, the Court of Appeal reversed that decision, finding the dispute over Fog City Diner's relationship with the Mustard Grill an issue for the jury to resolve. This case demonstrates that California courts will look beyond corporate name changes and closely examine the underlying ties between related entities to determine who should be on the hook for employment claims.

DID YOU KNOW???

Although California's WARN Act does not go into effect until January 1, 2003, employers must give notice in November 2002 of a January 2003 RIF if the RIF is subject to the new law, which is more expansive than Federal WARN.