



Resource Guide: “Hot Topics in Employment Law”

Recent Cases (with LexisNexis Overview of each Case)

Jespersen v. Harrah’s Operating Co., 444 F.3d 1104 (9th Cir. Nev. 2006) (The employer terminated the female employee, a bartender at a casino, for refusing to comply with the employer’s grooming policy, which required women to wear some facial makeup. On appeal of the district court’s judgment, the court held that the employer was properly granted summary judgment because the employee failed to show that the grooming policy imposed an unequal burden on women. The employer’s policy contained sex-differentiated requirements regarding each employee’s hair, hands, and face. While those individual requirements differed according to gender, none on its face placed a greater burden on one gender than the other. The employee also failed to show that the grooming policy was part of a policy motivated by sex stereotyping.)

EEOC v. Prospect Airport Servs., 2010 U.S. App. LEXIS 18447 (9th Cir. Nev. Sept. 3, 2010) (The male employee, a recent widower, alleged that a married female co-worker began making sexual overtures. The employee rejected her sexual advances, but she continued to proposition him for sex, made sexual gestures, and recruited other co-workers to deliver messages to him. The employee complained to management, but the employer’s responses were ineffectual. The employee subsequently was terminated, and he conceded that the quality of his work deteriorated because of his psychological difficulties on account of the co-worker’s campaign of harassment. The appellate court determined that the employer was not entitled to summary judgment as to the hostile work environment.)

Burlington Northern & Santa Fe Ry. v. White, 548 U.S. 53 (U.S. 2006) (The employee alleged that the employer retaliated against her for complaining about her supervisor’s sexual harassment by reassigning her from forklift duty to standard track laborer tasks and suspending her without pay before reinstating her. The Court determined that (1) the anti-retaliation provision, 42 U.S.C.S. § 2000e-3(a), unlike the substantive provision, 42 U.S.C.S. § 2000e-2(a), was not limited to discriminatory actions that affected the terms and conditions of employment, and (2) the employee needed to show that a reasonable employee would have found the challenged action materially adverse.)

Gomez-Perez v. Potter, 553 U.S. 474 (U.S. 2008) (The employee alleged that she filed an age discrimination complaint and was subsequently subjected to retaliation, including groundless complaints against her, false accusations, and reduction of her work hours. The Supreme Court found retaliation based on the filing of an age discrimination complaint was included within the meaning of the phrase "discrimination based on age" under § 633a(a). The court had previously found that a similar phrase in 20 U.S.C.S. § 1681(a) of Title IX of the Education Amendments of 1972, 20 U.S.C.S. § 1681 et seq., included retaliation against a person who complained of sex discrimination. The fact that the ADEA, in 29 U.S.C.S. § 623(d), specifically prohibited retaliation in the private sector while the federal-sector provision included no express prohibition did not preclude a federal-sector retaliation claim, as the prohibitory language of 29 U.S.C.S. § 623(a) differed from that of 29 U.S.C.S. § 633a(a).)

CBOCS West, Inc. v. Humphries, 553 U.S. 442 (U.S. 2008) (The Court, in examining the interpretive history of § 1981, found that (1) 42 U.S.C.S. § 1982 encompassed a retaliation action; (2) the Court had long interpreted 42 U.S.C.S. §§ 1981 and 1982 alike; (3) caselaw, without mention of retaliation, narrowed § 1981 by excluding from its scope conduct, namely post-contract-formation conduct, where retaliation would most likely be found; but in 1991, Congress enacted legislation that superseded that caselaw and explicitly defined the scope of § 1981 to include post-contract-formation conduct; and (4) since 1991, the lower courts had uniformly interpreted § 1981 as encompassing retaliation actions.)

Crawford v. Metro. Gov't of Nashville & Davidson County, 129 S. Ct. 846 (U.S. 2009) (The issue was whether the protection afforded by Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e et seq., extended to an employee who spoke out about discrimination not on her own initiative, but in answering questions during an employer's internal investigation. The lower court thought that answering questions fell short of opposition, finding that the opposition clause of 42 U.S.C.S. § 2000e-3(a) demanded active, consistent opposing activities to warrant protection against retaliation. Given the use of the word "oppose" in ordinary discourse, there was no reason to doubt that a person could oppose by responding to someone else's question. Moreover, a possibility that an employer might someday want to fire someone who might charge discrimination traceable to an internal investigation was unlikely to diminish the attraction of an Ellerth-Faragher affirmative defense. Thus, the employee's conduct was covered by the opposition clause of 42 U.S.C.S. § 2000e-3(a).)

Thompson v. North American Stainless, LP, 567 F.3d 804 (6th Cir. Ky. 2009) (Shortly after the Equal Employment Opportunity Commission (EEOC) notified defendant that plaintiff's fiancée, who also worked for defendant, had filed a charge alleging that her supervisors discriminated against her based on her gender, defendant terminated plaintiff's employment. Plaintiff alleged that he was terminated in retaliation for his fiancée's EEOC charge, and defendant contended that performance-based reasons supported plaintiff's termination. The court held that the district court properly found that plaintiff failed to establish retaliation under the plain language of § 2000e-3(a) because he did not claim that he engaged in any statutorily protected activity, either on his own behalf or on behalf of his fiancée. The court joined the Third, Fifth,

and Eighth Circuits in holding that the authorized class of claimants under § 2000e-3(a) was limited to persons who had personally engaged in protected activity by opposing a practice, making a charge, or assisting or participating in an investigation.)

Kasten v. Saint-Gobain Performance Plastics Corp., 570 F.3d 834 (7th Cir. Wis. 2009) (The employee sought to establish a claim for retaliation based solely on his allegation that he filed complaints with his employer regarding the location of the time clocks. The district court found that intra-company complaints were protected activity but concluded that unwritten verbal complaints were not protected activity. As the employee pointed out, the statute did not limit the types of complaints which would suffice, and in fact modified the word "complaint" with the word "any." Thus, the language of the statute would seem to include internal, intra-company complaints as protected activity.)

Background Materials

Laura Rothstein and Ann C. McGinley, *Disability Law: Cases, Materials, Problems* (LexisNexis Matthew Bender, 2010). Library Call No.: **KF3738.R68 2010 (Treatise Collection)**

Restatement of the Law, Third, Employment Law. Tentative draft, No. 3 (April 8, 2010). (American Law Institute, 2010). Library Call No.: **KF3319.R47 T.D. 2010 (Treatise Collection)**

Robert N. Covington, *Employment Law in a Nutshell*. 3rd ed. (West, 2009). Library Call No.: **KF3455.Z9 C68 2009 (Reserve Collection)**

Raymond F. Gregory, *Unwelcome and Unlawful: Sexual Harassment in the American Workplace*. (Cornell University Press, 2004). Library Call No.: **KF3467.G74 2004 (Treatise Collection)**

Benjamin E. Griffith, *Sexual Harassment in the Public Workplace*. (American Bar Association, 2001). Library Call No.: **KF3467.A7 S49 2001 (Treatise Collection)**

Law Review / Journal Articles

George, Tracey E., Gulati, G. Mitu and McGinley, Ann, *The New Old Legal Realism* (July 30, 2010). UNLV William S. Boyd School of Law Legal Studies Research Paper No. 10-31. Available at SSRN: <http://ssrn.com/abstract=1647179>

Harper, Michael C., *The Causation Standard in Federal Employment Law: Gross v. FBL Financial Services, Inc., and the Unfulfilled Promise of the Civil Rights Act of 1991*, 58 BUFFALO L. REV. 69 (2010).

Hartley, Roger C., *Freedom Not to Listen: A Constitutional Analysis of Compulsory Indoctrination Through Workplace Captive Audience Meetings*, 31 BERKELEY J. EMP. & LAB. L. 65 (2010).

McGinley, Ann C., "Creating Masculine Identities: Bullying and Harassment "Because of Sex"" (2008). *Scholarly Works*. Paper 18.

<http://scholars.law.unlv.edu/facpub/18>

McGinley, Ann C., "Harassing "Girls" at the Hard Rock: Masculinities in Sexualized Environments" (2007). *Scholarly Works*. Paper 20.

<http://scholars.law.unlv.edu/facpub/20>

McGinley, Ann C., *Babes and Beefcake: Exclusive Hiring Arrangements and Sexy Dress Codes*. Duke Journal of Gender Law & Policy, Vol. 14, p. 257, 2007; UNLV William S. Boyd School of Law Legal Studies Research Paper No. 08-02. Available at SSRN: <http://ssrn.com/abstract=1027133>

McGinley, Ann C., *Harassment of Sex(y) Workers: Applying Title VII to Sexualized Industries*, 18 YALE J.L. & FEMINISM 65 (2006) (Symposium).

McGinley, Ann C., *Functionality or Formalism? Partners and Shareholders as "Employees" Under the Anti-Discrimination Laws*, 57 SMU L. REV. 3 (2004).

McGinley, Ann C., *Viva La Evolución! Recognizing Unconscious Motive in Title VII*, 9 CORNELL J.L. & PUB. POL'Y 415 (2000).

Joiner, Amelia Michelle, *The ADAAA: Opening the Floodgates*, 47 SAN DIEGO L. REV. 331 (2010).

Zehrt, Lynn Ridgeway, *Retaliation's Changing Landscape*, 20 GEO. MASON U. CIV. RTS. L.J. 143 (2010).

Websites

U.S. Equal Employment Opportunity Commission

<http://www.eeoc.gov/>

U.S. United States Department of Labor

<http://www.dol.gov/>

Nevada Office of the Labor Commissioner

<http://www.laborcommissioner.com/>

Ann C. McGinley, SSRN Author Page

http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=543370

Scholarly Commons@UNLVLaw: Labor & Employment Law

http://scholars.law.unlv.edu/cgi/query.cgi?connector_1=and&field_1=lname&op_1=eq&value_1=&connector_2=and&field_2=title&op_2=contains&value_2=&connector_3=and&field_3=discipli

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Workplace Prof Blog

http://lawprofessors.typepad.com/laborprof_blog/

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