// EMPLOYMENT NOTES

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EMPLOYMENT NOTES

The Supreme Court Speaks

Employers in the Toilet?

Maybe Not!

The widely reported case of *Reeves v. Sanderson Plumbing Products, Inc.* was decided by the United States Supreme Court on June 12, 2000. Due to the alleged impact this case has on the employment community, it is appropriate for your editor to contribute his analysis.

To start our analysis, we must remind our readers of the famous law school cliché: "Hard Facts Make Bad Law." This means that judges and juries are human beings and tend to try to be kind in many cases. It would be awfully difficult for a jury to sustain the termination of Roger Reeves, our toilet seat hero, regardless of the employer's case. Mr. Reeves, age 57, worked for Sanderson for 40 years. He was a low level supervisor in the hinge manufacturing part of the toilet seat factory. Sanderson is a family business with Mrs. Sanderson in charge, but her husband, Powe Chestnut, running the day to day operations.

In a scene that could be loosely borrowed from *The*

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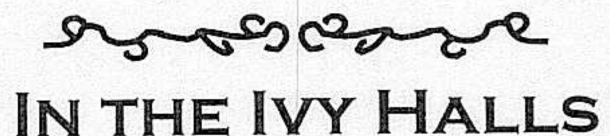
Thoughts from the Editor

Continuing our tradition of responding to the hot items in employment, we switched our planned lead story to the new Supreme Court ruling. We appreciate the kind words we receive from readers all over North America. Please keep in mind that we are pleased to consider article topics from our readers.

Each issue averages about a dozen readers who have moved without sending us a change of address. We again ask that readers fax or e-mail us their new information when they move. Also, many of our readers are mobile professionals. We are happy to continue to send your *Employment Notes* to your new position, while sending another copy to your replacement.

Some of our readers may have noticed that we stopped referring to our friends at MTI Global Group. Over the last quarter, CMG and MTI mutually decided not to merge operations. However, the two organizations will continue to work together on projects and to bid on large contracts.



IN THE IVY HALLS

Your fearless editor has been teaching graduate employment law and human resource management courses in the Washington area for National-Louis University and Keller Graduate Business School.

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Music Man, Mr. Chestnut suspected that "there was something rotten in River City." Specifically, he suspected that the hinge operation was falsifying attendance records. This may have caused the operation to pay for hours not worked and might be setting a bad precedent in this union shop. There were three supervisors involved: Mr. Reeves, 57; Joe Oswalt, mid thirties; and the supervisor of these two men, Russell Caldwell, 45. Following a brief investigation, **the two older men were terminated**. It is implied, but not stated, in the Opinion of the Court that Oswalt was not fired. Also, while Mr. Caldwell might well have had a claim, there is no mention of an action being filed by him, although he was, (surprise), a witness for Mr. Reeves.

At the trial, Mr. Reeves established what is known as a *prima facie* case. This means that he met the minimum standard to bring his case to court. He was over 40, he was qualified for his job, he was fired, and he was replaced by several different supervisors in their thirties. He introduced testimony that Mr. Chestnut made numerous age related comments against him. He also testified that the time records were as correct as he could make them. Some of his testimony included the fact that the electronic time clock did not always work, requiring manual corrections. In the case of a specific employee's absences being recorded incorrectly, he was not at work on those days. Mr. Reeves testified that he not responsible for disciplining employees for attendance. He pointed out that there were no grievances regarding time recording.

In contrast, Sanderson heavily relied on the testimony of Mr. Chestnut at trial. He confirmed that the time clock did not always work, confirmed that there was a specific employee that Mr. Reeves failed to discipline, and even confirmed that Mr. Reeves was not responsible for employee absenteeism discipline.

The jury in the Northern District of Mississippi found that Sanderson had willfully discriminated against Mr. Reeves due to his age. The award was a modest $35,000, which was doubled by the trial court under the provisions of the ADEA. Not content to accept its modest losses, Sanderson went to the US Fifth Circuit Court of Appeals. The Fifth Circuit is widely regarded as a pro-employer court. It did not disappoint in this case, reversing the jury verdict for Mr. Reeves. The reasoning was interesting. While Mr. Reeves had his *prima facie* case, and he had knocked out the reasons offered by Sanderson, the Appeals Court found that Mr. Reeves had not proven that the termination was due to age discrimination. Roughly five years after the termination, the case was argued before the United States Supreme Court. The current court has produced both pro-employer and pro-employee decisions, so it is not easy to predict how the court will rule. In this case, a unanimous court ruled in favor of Mr. Reeves. The Supreme Court found that there was enough evidence to support the age discrimination decision by the jury.

"But wait!" (Many readers exclaim in unison.) "We thought this case stands for the proposition that claimants in EEO cases no longer have to have direct evidence of discrimination, circumstantial evidence will do." The mainstream media did portray the case in this manner. However, the distinction between direct and circumstantial evidence in EEO cases has never been that clear. It is rare to have direct evidence of racial or sexual harassment. In this case, Mr. Reeves did present direct evidence of age related comments by Mr. Chestnut, the spouse of Sanderson's president. While the Fifth Circuit disregarded this direct evidence, the Supreme Court correctly found that this was a factual determination within the power of the jury to decide.

The Supreme Court decision also presents some strong logic. When the defendant employer presents certain arguments to support an employment decision and then those arguments are proven to be false, it is understandable that the jury will infer that the employer is lying

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when it claims that it was not committing illegal discrimination when it terminated the claimant. Support for jury verdicts in "hard cases" rarely meets the standards that employers would like to see.

The way the *Sanderson* decision was reported may increase the likelihood that a disgruntled employee may bring an action. But, it does not mean that there has been a quantum change in the way evidence is evaluated in discrimination cases. In fact, the impact is likely to be more cosmetic in nature than real, due to the nature of discrimination cases and the way judges, and especially juries, evaluate evidence.

ACTION PLAN

1. Follow progressive discipline and document it thoroughly for all employees.
2. Research your case before terminating an employee. Consider suspension rather than termination until you can confirm the facts. It is easier to undo a suspension.
3. Consider implementing a dispute resolution program to give employees an opportunity to be heard prior to approaching outside agencies or the courts.
4. When you make a mistake, settle as early as possible. It will rarely be easier later.
5. When you know you have a winner, fight to the bitter end.

EMPLOYERS MOVE TO BLOCK UNAUTHORIZED DOL ACTION

Many employers are aware that the Department of Labor has published proposed regulations to take effect 60 days from their publication date of June 13, 2000. The regulations would permit states to pay unemployment benefits to persons not otherwise able to receive them while on FMLA leave. Various employer groups and some Republican Congressmen have questioned the authority of the DOL to award benefits to persons who have jobs and are voluntarily away from work. Now is a good time to contact your congressional representatives, if you have not done so already.

NINTH CIRCUIT COURT OF APPEALS RULES

Ability to Have Sex is Protected Under the ADA

In what appears at first blush to be completely outside of the Americans with Disability Act, the most liberal of the federal courts of appeals has ruled that an employee can proceed with his ADA claim.

The facts reported indicate that Richard McAlindin, a systems analyst for San Diego County, had anxiety and panic disorders. The medication he took for these conditions allegedly caused impotence. Mr. McAlindin requested a transfer to a less stressful position, and when this was denied, he filed an ADA claim. His case is that due to his stressful job he must take medication and the medication makes him impotent, causes trouble sleeping and has other side effects. The short story is that the county wanted him in his current position, and when it forced him to return to work after a period of workers compensation and disability leave, he claimed both an ADA violation and retaliation. The trial court granted summary judgment for the county on both claims. The Appeals Court ruling only reversed the ADA claim, but upheld the summary judgment on the retaliation claim.

The County's case was that this was not a work related disability and that there was no need to accommodate it. In fact, the County pointed out that Mr. McAlindin has been performing his current position for the full six years that this case has been pending. In addition, there are other federal circuit court opinions that appear to be contrary to the Ninth Circuit's ruling. Unfortunately, the US Supreme Court declined to review the ruling of the Ninth Circuit on June 19, 2000. While this does not create a precedent, it certainly does not help resolve this issue.

The ADA has been much criticized for its vague language. The McAlindin case does not contribute to the cause of the truly disabled and lends additional credibility to the advocates for an overhaul of this law.

MISSION STATEMENT

Claremont Management Group, Inc. provides services through its own professionals and associated firms that are committed to helping organizations improve the administration and management of their human resources. Our commitment includes prompt and efficient service, adherence to the highest ethical standards, a commitment to diversity and equal opportunity, and reasonable fees for our services. A broad range of services are provided throughout North America to organizations of all kinds, including for-profit and non-profit.

ALEXANDRIA, VA OFFICE

CMG is pleased to announce its Alexandria, VA office. The details are to the right of this box. CMG will continue to have its conference and mediation facilities in Fairfax City, VA. Readers in Northern Virginia are invited to drop by to check us out.

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