

What's NEWS

A quarterly employment law update for State of Connecticut managers, HR personnel, and affirmative action professionals

Spring 2001



A message from the DAS Commissioner

Welcome to the first issue of *What's News*, a completely "updated" version of the former *Management Update* newsletter. Published quarterly, *What's News* will provide managers, HR professionals and affirmative action officers with the latest information, court rulings, and developments in employment law.

Much of the information will focus on actual case studies and analyses that impact both state employees and the HR operations of state agencies. While *What's News* is not intended to be a substitute for professional legal advice, we hope you will find it a useful reference tool that helps you become better acquainted with human resources issues in today's workplace.

Most importantly, we'd like to hear your thoughts on *What's News*. Please let us know your suggestions for future issues as well what you find helpful or where we could improve.

Barbara Waters

DAS Department of Administrative Services Business Advisory Group

Individuals Can't Sue States in Federal Court for Money Damages under ADA

In a much-awaited decision, the U.S. Supreme Court in *Board of Trustees of the University of Alabama v. Patricia Garrett* [193 F.3d 1214] held, on February 21, 2001, that individuals may not sue a state for monetary damages in federal court for failure to comply with Title I (employment discrimination provisions) of the Americans with Disabilities Act (ADA). These suits are barred by the 11th Amendment to the U.S. Constitution, which grants states sovereign immunity from suit in federal court.

The ruling in *Garrett* added to the Supreme Court's series of decisions that have increasingly tipped the federal-state balance of power toward the states, beginning in 1996 with *Seminole Tribe of Florida v. Florida* [517 U.S. 44]. That case hinged on the states' 11th Amendment immunity and articulated a two-part test for determining whether an act of Congress properly nullifies that immunity: (1) Did Congress unequivocally state its intention to override state immunity? (2) Did it act pursuant to a valid grant of constitutional authority? In 1999 the Supreme Court, applying the *Seminole* test, held that states could not be sued for overtime violations under the Fair Labor Standards Act [*Alden v. Maine*, 527 U.S. 706] and a decision last year held that state employees cannot sue the state for violations of the Age Discrimination in Employment Act (ADEA) [*Kimel v. Florida Board of Regents*, 528 U.S. 62].

Case Facts

Garrett, a registered nurse employed as Director of Nursing for the University of Alabama in Birmingham Hospital, was diagnosed with breast cancer and subsequently underwent treatments that required her to take substantial leave from work. Upon returning to work, she was informed by her supervisor that she would have to give up her Director position. She then applied for and received a transfer to another, lower paying position.

Ash, the second respondent in this case, worked as a security officer for the Alabama Department of Youth Services. When he began his job, he informed the Department that he suffered from chronic asthma and that his doctor recommended he avoid carbon monoxide and cigarette smoke. He requested modification of his duties to minimize his exposure to these substances. When he was later diagnosed with sleep apnea, again pursuant to his doctor's recommendation, he requested that he be reassigned to daytime shifts to accommodate his condition. The Department did not accommodate Ash and shortly after filing an EEOC claim, he noticed that his performance evaluations were lower than those he received previously.

Garrett and Ash filed separate lawsuits, both seeking monetary damages under the ADA. Both employers moved for summary judgment, claiming that they were immune from suit under the 11th Amendment and

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that Congress did not properly abrogate that immunity when it passed the ADA. The trial courts agreed and granted their motions. The cases were consolidated on appeal to the 11th Circuit, which reversed the lower court decisions by ruling that Garrett and Ash could sue under the ADA. In a 5-4 decision, the Supreme Court reversed the Circuit Court.

Case Analysis

The 11th Amendment presupposes that each state is a sovereign entity within our federal system. Inherent in the nature of sovereignty is the right to not be subject to suit by individuals without giving consent.

Applying the two-part *Seminole* test in *Garrett*, the Court did not dispute that Congress intended to nullify the state's immunity and subject them to suits under the ADA. However, the Court did find that Congress exceeded its constitutional authority by attempting to do so in this case.

The states' guarantee of sovereign immunity under the 11th Amendment is not without limit. The 14th Amendment, Section 5, grants Congress the power to enforce the Equal Protection Clause of the Constitution (14th Amendment, Section 1) by enacting appropriate legislation. To the extent that Congress reaches beyond the scope of the protections granted by the Equal Protection Clause, it must exhibit "congruence" and "proportionality" between the injury to be prevented or remedied and the means adopted to that end. The Equal Protection Clause provides the highest level of protection ("strict scrutiny") to those who suffer discrimination based on

Does this mean that you can ignore the ADA? Not at all. This ruling only prevents individual plaintiffs from filing ADA claims against the state in federal court for monetary damages.

their race, religion or nationality. These categories are commonly referred to as "suspect classifications." Other types of discrimination – such as age, sex and disability – are entitled to less constitutional protection ("rational-basis review"). The Supreme Court had previously held that the states' treatment of disabled individuals is subject only to minimum "rational basis" review.

According to the *Garrett* decision, the legislative record of the ADA failed to show that Congress identified a pattern of irrational state employment discrimination against disabled individuals. Although there were half a dozen examples relevant to the states in the record, the majority of the justices found that these did not suggest a pattern of unconstitutional discrimination on which to base legislation. In other words, in the Court's opinion the rights and remedies created by the ADA did not show the necessary "congruence" and "proportionality."

Bottom Line

Does this mean that you can ignore the ADA? Not at all. This ruling only prevents *individual* plaintiffs from filing ADA claims against the state in *federal court* for *monetary damages*.

- 1 Individuals can still sue for *injunctive relief* – a court order – requiring a state to comply with the ADA.
- 1 Title II of the ADA, which deals with the services, programs, or activities of a public entity, was not affected by this decision.
- 1 The Equal Employment Opportunity Commission can sue the states for money damages on behalf of an individual.
- 1 Individuals can still sue a state in *state court* under *state disability law* after (a) exhausting any administrative remedies under the Commission on Human Rights and Opportunities and (b) receiving a release to sue from CHRO.

One final caution, many claims of discrimination, failure to accommodate, etc., are accompanied by claims of retaliation. Even if the underlying claim is without merit or barred, a claim of retaliation may succeed.

State Reaches Settlement in ADA Suit

In February, the state announced that it had reached a settlement in the class action suit *Duprey v. Connecticut State Department of Motor Vehicles*. The suit, filed by Michelle Duprey in 1996, claimed the \$5 fee for handicap parking placards charged by the state DMV was an illegal surcharge and a violation of the Americans with Disabilities Act (ADA). A U.S. District Court judge ruled in Duprey's favor in 1998 and the state stopped charging the fee for all users. The suit later gained class-action status, involving all placard purchasers prior to August 1993. Under the settlement, the state agreed to pay \$100,000 to disability and legal organizations for programs that promote education and programs about the ADA and other disability issues. The largest portion of the settlement, \$50,000, went to the UCONN School of Law Foundation to support a separate ongoing legal clinic on Disability Rights Law. The settlement was hailed an innovative solution, better than reimbursing individuals the \$5 fee, and a win-win for everyone in helping to ensure and expand the legal rights of people with disabilities.

Note: Had this case proceeded to trial, it would not have been affected by the recent U.S. Supreme Court decision in *Garrett* (See page 1). *Garrett* involved Title I (Employment) of the ADA. This issue falls under Title II (Public Services), which the justices expressly declined to review in *Garrett*.



State Can Compel Use of Comp Time in Lieu of Overtime Payments

The Fair Labor Standards Act (FLSA) permits states and their political subdivisions (but not private employers) to compensate their employees for overtime work by granting them compensatory time in lieu of cash payment. Depending upon the type of job involved, employees are allowed to accrue a maximum of 240 or 480 hours in comp time. The Act specifies that employees who have reached this cap must be paid cash compensation for additional overtime hours worked. Employees who leave their jobs with accrued comp time must also be paid for that time.

When Harris County, Texas, became concerned that it lacked the resources to pay monetary compensation to employees who worked overtime after reaching the statutory cap on compensatory time accrual, and to employees who left their jobs with sizable reserves of accrued time, it adopted a policy of requiring its employees to schedule time off in order to reduce the amount of accrued comp time.

The deputy sheriffs sued, claiming that the FLSA does not permit an employer to compel an employee to use compensatory time in the absence of an agreement permitting the employer to do so. The federal district court granted the sheriffs summary judgment. The 5th Circuit Court of Appeals reversed, holding that the FLSA did not speak to the issue and thus did not prohibit the county from implementing its policy. The U.S. Supreme Court, in *Christensen v. Harris County* [158 F.3d 241], agreed with the 5th Circuit, stating, "...nothing in the FLSA or its implementing regulations prohibits an employer from compelling the use of compensatory time."

Read the case in pdf format (requires Adobe Acrobat) <http://supct.law.cornell.edu/supct/pdf/98-1167PZO> or text format <http://supct.law.cornell.edu/supct/html/981167.ZO.html>.

FLSA Prohibits Disciplinary Partial-Day Deductions for Public-Sector Exempt Employees

The U.S. Department of Labor has issued an opinion letter reiterating that the Fair Labor Standards Act (FLSA) special salary basis rule that allows public-sector employers to make partial-day deductions from exempt employees' salaries for certain kinds of absences does not permit partial-day salary docking for disciplinary reasons.

The FLSA regulation on the salary basis test, which was modified for public sector employees effective in 1992 [29 C.F.R. 541.5(d)], allows public employers to make deductions for absences of less than a day from the salary of exempt employees provided the pay system used has been established:

- 1 by statute, ordinance or regulation, or
 - 1 by a policy or practice established pursuant to principles of public accountability,
- under which:
- 1 the employee accrues personal leave/sick leave and
 - 1 deductions from pay are required for absences for personal reasons, illness or injury when accrued leave is not used.

The regulation also allows public-sector employers to furlough exempt employees for budget-required reasons without risking the loss

of the exemption status. This special regulation has never applied to a partial-day disciplinary suspension. Thus, the disciplinary deduction rule for public employers is the same as for private employers, i.e., such deductions are not permitted (when made in partial-week increments) except as penalties for violations of "safety rules of major significance" [29 C.F.R. Sec. 541-118(a)(5)]. However, the salary test also states that employees need not be paid for weeks in which they perform no work [29 C.F.R. Sec. 541.118 (a)]. This recent opinion letter summarizes the background leading to the modified regulation and restates the law.

The regulations can be found on the U.S. Department of Labor home page, <http://www.dol.gov>, under "Laws and Regs."



HR Learning Center Upcoming Classes

The spring 2001 catalog of course offerings for the HR Learning Center is hot off the press! The *ADA: The Next Generation* course will be offered in a new location—the Governor's Southwestern Office in Bridgeport. And five new courses have been added:

- *Hidden Disabilities in the Workplace*
- *Diversity Training*
- *Navigating the Freedom of Information Act*
- *Workplace Ergonomics*
- *Talent Management System* – A structured program of four workshops designed to assist HR professionals, managers, supervisors and employees in developing the current workforce to ensure future staffing needs.

Courses fill up quickly. Don't miss out on attending a class you've been waiting for. If you haven't received your catalog, please contact Kathleen Sullivan at (860) 713-5231 or Carl Passanisi at (860) 713-5151.



Crime Doesn't Pay

Last August the Connecticut Supreme Court reversed itself and ruled that an arbitration award reinstating an employee who was fired after being convicted of embezzlement violated public policy.

Facts of the Case

David Warren, a weighmaster at the Groton Landfill, was arrested by the Groton Police on two counts of larceny by embezzlement and one count of violating a Groton town ordinance. He was charged with taking money from residents for daily landfill permits and keeping it for himself. He pleaded *nolo contendere*—Latin for “I will not contest it” or “no contest”—to one count of larceny and paid a small fine. He agreed to the plea bargain because a trial would have cost him substantial legal fees and his lawyer advised him that a *nolo* plea wasn't an admission of guilt.

The town did not undertake an independent investigation. Instead, it transferred Warren to a different department and notified him that “Once a court action was final, we will review its findings and take any disciplinary action, as appropriate, which may include action up to and including employment termination.” Upon learning that Warren pled *nolo contendere* to one count of larceny in exchange for the prosecution's agreement to drop the other charges, the town terminated him. Warren's union filed a grievance challenging his termination.

Under the terms of the collective bargaining agreement between Groton and the union, the town had the right to dismiss an employee for just cause. The town's policies expressly provided that disciplinary action could be imposed for a variety of offenses, including “conviction of a felony or misdemeanor arising out of the performance of duty or within the scope of employment which may affect the performance of duty.”

The arbitrator, reasoning that Warren had entered his no contest plea thinking that it wouldn't be used against him in later proceedings, ruled that Warren had been discharged without just cause and ordered him reinstated with limited back pay. According to the arbitrator, Warren had compelling reasons to enter a plea of no contest: significant legal fees balanced against a modest fine, and the advice of his attorney that he was not admitting any guilt.

The town asked a trial court to throw out the arbitrator's award because it violated public policy by reinstating an employee who had been convicted of embezzling. The court agreed and overturned the award. The union appealed the decision, and the case was heard by the Connecticut Supreme Court.

Initially, a five-member panel of the Supreme Court held that a *nolo contendere* plea is not an admission of wrongdoing. The court explained that unlike a plea of guilty, “a plea of *nolo contendere* is merely a declaration by the accused that he will not contest the charge.” The court agreed with the arbitrator that, because the employer had not sought to prove independently that the employee had embezzled funds, relying exclusively on his *nolo* plea, the employer established “little or nothing about the employee's guilt or innocence.” The court affirmed the arbitrator's decision to reinstate Warren.

Five months after its initial ruling, the full Connecticut Supreme Court reconsidered this decision and reversed itself, ruling that the arbitrator's award “violated the clear public policy against embezzlement, and that this policy encompasses the policy that an employer may not be required to reinstate the employment of one who has been convicted of embezzlement of his employer's funds, whether that conviction follows a trial, guilty plea, or a plea of *nolo contendere*.” The court noted that “parties cannot expect an arbitration award approving conduct which is illegal or contrary to public policy to receive judicial endorsement. . . .”

Comment

Although the ultimate ruling in *Groton* enables employers to discipline or discharge workers based on *nolo contendere* pleas under similar circumstances, employers would be wise to conduct their own investigation to obtain independent evidence of employee misconduct and base subsequent personnel action on the evidence discovered. This is true whether the misconduct involves a unionized employee protected against discharge except for “just cause,” or an “at will” employee.

Additionally, conducting an internal investigation to determine whether discipline is warranted is a more efficient method than waiting for the results of criminal proceedings, which can involve lengthy pre-trial processes and extended delays prior to ultimate resolution. If after such an internal investigation the employer reasonably concludes the employee has violated workplace rules, the employer may impose appropriate discipline, regardless of whether the state pursues criminal charges or what the outcome of those charges might be.

The case, *Town of Groton v. United Steelworkers of America* [254 Conn. 35], can be found at: <http://www.jud.state.ct.us/external/supapp/AROCr/cr99.pdf>.

You're the judge...

The employer has accommodated an employee with chronic fatigue syndrome for several years by allowing her to work a fixed reduced-hour schedule while classifying her as a full-time employee. The employer also permitted the employee to work at a site closer to her home three days a week. The remaining two days she worked in the central office (approximately 30 miles away). For business reasons, the employer closed the facility where the employee was working and reorganized its workforce. As part of the reorganization, the employee was required to work in the central facility five days a week. The employer continued to allow the employee to work a modified schedule and to classify her as full-time. Dissatisfied, the employee files suit claiming disability discrimination. The employee argues that she should be allowed to work a “no fixed start to work schedule” to accommodate her disability. *You're the judge. What do you decide?*

See “You Decide...” on back page

Needlestick Safety and Prevention Act

The Needlestick Safety and Prevention Act was passed unanimously by Congress and signed by President Clinton on November 6, 2000. It mandated that the Occupational Safety and Health Administration (OSHA) revise its Bloodborne Pathogens (BBP) standard to ensure more widespread use of safer medical devices. OSHA had six months in which to do this. The revised rules were published in the Federal Register on January 18, 2001 [29 CFR Part 1910] and become effective April 18, 2001. (A copy of the rules can be found on OSHA's website at www.osha-slc.gov/needlesticks/index.html.)

According to the Act, in March 2000, the Centers for Disease Control and Prevention (CDCP) estimated that nearly 600,000 injuries from contaminated sharp medical instruments occur annually among health care workers in the United States. Such injuries can involve needles or other sharp medical instruments contaminated with bloodborne pathogens, such as HIV, hepatitis B virus and hepatitis C virus. The CDCP estimated that selecting safer medical devices could prevent 62 to 88 percent of these injuries.

Revisions fall into four areas

The revisions to the BBP standard fall into four areas:

- 1 **Modification of definitions relating to engineering controls**
These do not reflect any new requirements for employers, but are meant to clarify the original standard, and to reflect the development of new safer medical devices since that time.
- 1 **Revisions and updating of the Exposure Control Plan**
The review and update of the plan is now required to: (a) reflect changes in technology that eliminate or reduce exposure to bloodborne pathogens, and (b) annually document

consideration and implementation of new and safer medical devices designed to eliminate or minimize occupational exposure.

- 1 **Solicitation of employee input** – Employers must now solicit input from non-managerial employees responsible for direct patient care who are potentially exposed to injuries from contaminated sharp medical instruments. Specific procedures intentionally were not given in order to allow for employer flexibility.
- 1 **Recordkeeping** – The employer is now required to keep a record of all injuries from sharp medical instruments, noting the type and brand of device used, where the injury occurred and an explanation of the incident.

Who Is Covered?

Connecticut adopted the initial BBP standard when it was issued in 1991. This means that state agencies are required to conform to the federal law. Agencies with even one employee who may be exposed to blood or other potentially infectious materials are required to have an "Exposure Control Plan." Employees who may be exposed include: police officers, fire personnel and security guards; physicians, dentists, nurses, medical examiners, paramedics and other health care workers; laundry and janitorial workers; correctional officers; social workers; and employees who may perform first aide as part of their jobs.

Note: The HR Learning Center's training on Bloodborne Pathogens covers the new OSHA rules. There is still space available for the May 8 class. To register, contact Kathleen Sullivan at (860) 713-5231 or by e-mail: kathleen.sullivan@po.state.ct.us.

In Brief.....

New Ergonomics Standard Repealed—The Congress, in early March, voted to rescind the Occupational Safety and Health Administration's (OSHA) new ergonomics standard that had become effective January 16, 2001. President Bush signed the repeal on March 20. The rules—which required employers to provide all employees with basic information on musculoskeletal disorders (MSDs), implement special ergonomics programs when specific risk factors developed, and provide wage replacement and medical treatment for up to 90 days to employees who develop an MSD—were hotly contested by employer groups and several national associations and organizations mounted legal challenges. This was the first action ever taken under the Congressional Review Act of 1996. The Act requires agencies to send all final regulations to Congress for review and gives Congress the power to reject the regulations by a simple majority vote in both chambers....**Employers Allowed to Offer Disparate Mental, Physical Benefits**—Seven federal appeals courts have ruled that the Americans with Disabilities Act does not prevent employers from offering a different level of benefits for mental disabilities than for physical ailments. The 2nd Circuit Court of Appeals (which binds Connecticut, New York and Vermont federal courts) is the most recent to strike down the Equal Employment Opportunity

Commission's position [*EEOC v. Staten Island Savings Bank*, 207 F.3d 144]....**Bush Unveils "Freedom Initiative" February 1**—The president promises to fully enforce the ADA and spend an additional \$1 billion over five years for existing and new disability programs. The initiative calls for more integrated community-based medical care, more special education funding and a tax break for employers to spur telecommuting. Read more about the initiative at (text version) www.whitehouse.gov/news/freedominitiative/freedominitiative.html or www.whitehouse.gov/news/freedominitiative/freedominitiative.pdf (requires Acrobat Reader)....**Under the heading of laaarge awards**—Coca-Cola Co. will pay a record \$192.5 million to settle a racial bias case covering 2,000 black workers who said they lost out on pay and promotions. (The previous record settlement in a racial discrimination was \$176.1 million paid by oil-giant Texaco Inc.) The settlement includes at least \$113 million in payments to the plaintiffs, future pay adjustments, and training and oversight programs to improve working conditions....Microsoft Corp. has agreed to a \$96.9 million settlement in class action lawsuits where it was found liable for its practices of hiring and retaining temporary employees in order to avoid paying benefits. The settlement will compensate over 8,000 class members and cover attorney fees and litigation costs.

Q Are domestic partners covered under the federal Family and Medical Leave Act (FMLA) and C.G.S. 5-248a?

A No. Neither FMLA nor C.G.S. 5-248a cover leaves taken to care for domestic partners. Both FMLA and C.G.S. 5-248a mandate leaves to care for a seriously ill spouse, parent or child. (Note: Parents-in-law are not covered under either law.) An agency that permits an employee to take leave to care for a domestic partner would have to provide that employee an additional 12 weeks (FMLA) or 24 weeks (C.G.S. 5-248a) of leave under these laws if the need arose. (Additional note: Although same-sex domestic partners of state employees are granted the same health insurance and pension benefits available to spouses of state employees, they are not covered under federal FMLA or C.G.S. 5-248a.)

Q If a holiday falls during an employee's federal FMLA leave period, does the holiday count against the employee's 12-week entitlement?

A Yes. According to the U.S. Department of Labor's (DOL) regulations, "... the fact that a holiday may occur within the week taken as FMLA leave has no effect; the week is counted as a week of FMLA leave." [29 C.F.R. Sec. 825.200(f)] In this situation, employees on unpaid FMLA leave would not be entitled to holiday pay, but employees who are using paid sick or vacation time for their FMLA absence would be entitled to holiday pay if it is the employer's policy to pay all other employees on paid leave for holidays. Although employees may be paid for a holiday, it would not extend their entitlement. For example, an employee receiving pay for one holiday would not then receive 12 weeks and one day of FMLA leave. The leave entitlement remains 12 weeks. (DOL Opinion Letter, 12/7/93). Note however: If an employer's business activities temporarily

cease (e.g., summer vacations or plant closings), the days the employer is closed cannot be counted against an employee's leave entitlement.

Q Can an employee receiving Social Security Disability Insurance (SSDI) be considered a qualified individual under the Americans with Disabilities Act (ADA)?

A Yes. Under certain circumstances, a person may be disabled for the purposes of the Social Security Administration (SSA) and still be a qualified individual with a disability under the ADA. The U.S. Supreme Court investigated this seemingly contradictory contention in a 1999 case, *Cleveland v. Policy Management Systems Corp.* [526 U.S. 795], and determined that employees should have the opportunity to proceed under both statutes if they can explain the inconsistencies between their SSDI statements that they are unable to work and their ADA claims that they are "qualified." The court noted differences in the definition of disability under SSDI and the ADA. Under the ADA, an employee is a qualified individual with a disability if he or she can perform the essential functions of the job with reasonable accommodation. However, the SSA determines disability without regard to reasonable accommodations. Additionally, the SSA's regulations allow for a list of disabilities that automatically qualify an employee for SSDI benefits. Because of these differences in definition and procedure, the court refused to endorse a presumption against ADA claimants who have applied for SSDI benefits. It is possible, therefore, for employees to qualify for SSDI benefits and be considered a qualified individual with a disability under the ADA, but the individual filing a suit must convince the court that these two facts are not inconsistent.

You decide...

... for the employer. This is an actual Connecticut case, which the employee lost. [*Ezikovich v. Commission on Human Rights and Opportunities*, 57 Conn. App. 767 (2000).] Although the ADA accommodations include "job restructuring, part-time or modified work schedules," an employer is not obligated to provide an employee the accommodation he or she requests or prefers. It need only provide some reasonable accommodation. The court held that the modified work schedule offered by the employer effectively accommodated the employee's condition while permitting the employer to satisfy its own management needs. The court also noted that an employee who is unable to come to work on a regular basis, which would be the result of the employee's proposed "no fixed start to work schedule," is unable to satisfy any of the functions of the job in question, must less the essential ones.

Note: Because the regulations enacted under the ADA specifically list job restructuring and part-time and modified work schedules as reasonable accommodations, it would be difficult for an employer to successfully argue that any change in a disabled employee's schedule would be unreasonable. In this case, the employer was well served by the fact that it had been accommodating this employee all along. Additionally, the employee was unyielding in her demands.

What's New(s) is published quarterly by the Department of Administrative Services Business Advisory Group. Its purpose is to give basic information to state managers, HR personnel and affirmative action professionals on legal issues that affect employment. It is not intended to be a substitute for individual professional legal advice on a specific case. Individual problems should be reviewed by the agency's staff attorney or the Attorney General's office.

**Governor John G. Rowland
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