

# What's NEWS

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

Spring 2002

## Editor's Note

In the future, *What's News* will be distributed electronically to those readers who register on our listserv. From snail mail to e-mail! To learn how you can receive the newsletter – as well as other special alerts – via e-mail, please see page 7.

## U.S. Supreme Court Decisions Narrow Reach of ADA

The year 2002 is turning out to be a major milestone in the history of the Americans with Disabilities Act (ADA). According to Justice Sandra Day O'Connor, the Court's current term probably will be remembered as the "disabilities act term." The high court agreed to hear cases deciding: whether carpal tunnel syndrome is a disability; whether seniority trumps a disabled employee's right to reassignment under the ADA; whether threat to one's self is an ADA defense; and whether punitive damages can be awarded under ADA. This article will explore two of those decisions.

In the first case, decided in January of this year, the Court unanimously ruled that an employee whose carpal tunnel syndrome prevented her from doing certain manual tasks at work was not necessarily disabled within the meaning of the ADA and, therefore, was not entitled to its protections. The Court said that to be disabled in the major life activity of performing manual tasks, an individual must be substantially limited in performing activities that are "of central importance to most people's daily lives" and not just those activities and tasks necessary for the performance of a particular job. [*Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 224 F.3d 840]

Two months later the Court, in a sharply divided decision, held that an employer is not required to make a reasonable accommodation if to do so would violate an existing bona fide seniority system. However, while the ADA does not trump a seniority system in the normal run of cases, an employee may argue that special circumstances in a particular case may override seniority. [*U.S. Airways v. Barnett*, 228 F.3d 1105]

Both decisions have been hailed as employers' victories. It should be noted, however, that both cases left issues to be decided another day.

## Background – ADA

Under the ADA, an individual is considered disabled if he/she:

- 1) has a physical or mental impairment that substantially limits one or more major life activities,
- 2) has a history or record of such impairment, or
- 3) is regarded by others as having such an impairment.

The act does not list which specific impairments qualify. Major life activities are defined as activities that an average person can perform with little or no difficulty. Equal Employment Opportunity Commission (EEOC) regulations have identified walking, breathing, seeing, hearing, speaking, learning, performing manual tasks and working as major life activities.

The act requires that the disabled person be qualified – able to perform the job's essential functions with or without reasonable accommodation by the employer.

Employers are required to provide reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless it can

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demonstrate that the accommodation would impose an undue hardship. Employers are not required to reallocate essential functions of a job as a reasonable accommodation, nor are they required to provide the particular accommodation the employee requests if another accommodation is as effective. The employer and employee are expected to engage in an interactive process to identify an appropriate accommodation.

## **Toyota v. Williams** **Case Facts**

Ella Williams began working at the Toyota automobile manufacturing plant in Kentucky in 1990. Her work with pneumatic tools on an engine fabrication assembly line eventually caused pain in her hands, wrists and arms. Toyota’s in-house medical service diagnosed her condition as bilateral carpal tunnel syndrome and bilateral tendonitis. Her personal physician placed her on permanent work restrictions that precluded her from lifting or carrying more than a limited amount of weight, performing “overhead” work, using “vibratory or pneumatic tools” and engaging in constant repetitive movement of her wrists or elbows.

In light of these restrictions, Williams was assigned to various modified duty jobs for the next two years. Nevertheless, she missed some work due to a medical leave and eventually filed a claim under Kentucky Workers’ Compensation Act. Although the claim was settled and Williams returned to work, she was not satisfied with Toyota’s efforts to accommodate her. She filed an action in federal district court, contending that Toyota had not accommodated her disability in violation of the Americans with Disabilities Act (ADA). Ultimately, that suit was settled and when she returned to work, she was assigned a new job on a Quality Control Inspection Operations (QCIO) team. The team performed four tasks; Williams rotated between the first two.

Approximately two years later, Toyota announced that all QCIO employees had to rotate through all four tasks. The third task involved wiping down cars, at the rate of one per minute, with an oil that highlighted paint flaws. It required Williams to grip a wooden-handled sponge and keep her hands and arms at shoulder level for hours each day. As a result of this action, she began to experience pain in her neck and shoulders. She was diagnosed with a variety of ailments that caused pain to her upper extremities and requested that Toyota accommodate her by allowing her to return to the jobs that she could perform without difficulty. According to Williams, Toyota denied this request, and eventually Williams’ physicians placed her under a no-

work-of-any-kind restriction. Less than two months later, Toyota terminated her employment, citing her poor record of attendance.

Williams filed a disability discrimination claim with the EEOC, received a right to sue letter and filed an action against Toyota, alleging that the company had violated the ADA and the Kentucky Civil Rights Act by failing to reasonably accommodate her disability and by terminating her employment.

The district court found for Toyota. According to the court, although Williams had suffered from a physical impairment, the impairment did

**Carpel tunnel syndrome that does not severely impede major life activities but only prevents an employee from performing some job-related tasks is not a disability under the ADA.**

not meet the definition of a “disability” under the ADA because it had not “substantially limited” any “major life activity.” Because Williams was not disabled under the ADA’s definition, she could not be covered by the ADA’s protections.

The U.S. Court of Appeals for the 6<sup>th</sup> Circuit reversed the decision of the lower court. The appellate court held that Williams was substantially limited in her ability to perform manual tasks at work, such as the gripping of tools and repetitive work with her hands and arms extended above shoulder levels for extended periods. In this court’s view, she was disabled within the meaning of the ADA. Toyota petitioned the U.S. Supreme Court for review.

## **Case Analysis**

The issue: *What is the proper standard under the ADA for assessing whether an individual is substantially limited in the specific major life activity of performing manual tasks? Does an impairment qualify as a disability if it precludes an individual from performing only some of the tasks associated with a specific job?*

In reversing the 6<sup>th</sup> Circuit Court of Appeals’ holding, the U.S. Supreme Court said the appellate court did not apply the proper standard in its determination because it analyzed only a limited class of manual tasks associated with Williams’ specific job and failed to ask whether her impairments prevented or restricted her from performing tasks that are of “central importance to most people’s daily lives.” The Court gave such examples as bathing, washing one’s face, brushing one’s teeth, doing laundry and picking up around the house as types of manual tasks to be of central importance to people’s daily lives.

## *You’re the Judge*

The employee worked as a nurse in a private corporation from 1979 to 1995. She was supervised by a male who oversaw the company’s health care personnel. In 1992, she was assigned responsibility for the company’s workers’ compensation claims. The job required her to work closely with her supervisor, who was considered the plant’s “workers’ compensation expert.” Between 1985 and 1996, the employee became convinced that her supervisor was harassing her; the harassment took the form of critical evaluations and criticism of her attitude. The employee claimed that her supervisor “taunted me, sneered at me, [and] spoke to me in sarcastic and insulting tones constantly.” In 1995, the employee notified her employer that she had been diagnosed with depression and blamed the depression on “continuous, unrelenting mistreatment and unnecessary harassment” by her supervisor. Her letter demanded that she “be relieved from reporting to, associating with, or otherwise being subjected to the antics of [her supervisor].” The company refused to shift supervisors, and the employee left her job. She filed suit in district court, claiming the company refused to accommodate her disability in violation of the Americans with Disabilities Act (ADA). The district court dismissed her case, concluding that the employee had failed to demonstrate that her requested accommodation was reasonable. Arguing that the accommodation was reasonable, the employee appealed the district court’s decision. *You’re the judge. Does she win her case?*

*See “You Decide...” on back page.*

In reaching its decision, the Court was guided first and foremost by the words of the ADA's disability definition itself. "Substantially" in the phrase "substantially limits" suggests *considerable* or *to a large degree*; it precludes impairments that interfere in only a minor way with the performance of manual tasks from qualifying as disabilities.

"Major" in the phrase "major life activities" means *important*. Therefore, "major life activity" refers to those activities that are of central importance to daily life. The Court said that such examples as bathing, brushing one's teeth, etc. should have been part of the assessment of whether Williams was substantially limited in performing manual tasks.

There was no support for the idea that the question of whether an impairment constitutes a disability is to be answered only by analyzing the effect of the impairment in the workplace. Even more critically, the manual tasks unique to any particular job are not necessarily important parts of most people's lives. As a result, occupation specific tasks may have only limited relevance to the manual task inquiry. The Supreme Court noted, "Merely having an impairment does not make one disabled for purposes of the ADA."

The Court also noted that not everyone with carpal tunnel syndrome is disabled, and stated that each individual must be assessed on a case-by-case basis to determine whether he or she is protected by the ADA. Both the severity and the duration of the symptoms of carpal tunnel syndrome vary, and the court advised the lower courts to look closely at impairments that are not permanent, since to be disabled under the ADA the impact of the impairment must be "permanent or long term." Quoting from another case, "The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual...The determination of whether an individual is substantially limited in a major life activity must be made on a case-by-case basis."

## Bottom Line

This case builds on the precedents set in three 1999 U.S. Supreme Court decisions that essentially held that individuals claiming ADA protection must be evaluated taking into consideration any corrective measures. In the first case, *Sutton v. United Air Lines* (527 U.S. 471), the plaintiffs, two sisters, suffered from severe myopia. The determination of whether they were substantially limited in a major life activity (i.e., seeing) was based on how each functioned when wearing glasses, not how they functioned without their glasses.

In the second case, *Albertson's, Inc. v. Kirkingburg* (527 U.S. 555), the Court held that monocular vision is not invariably a disability, but must be analyzed on an individual basis – again, taking into account the individual's ability to compensate for the impairment. And in *Murphy v. United Parcel Service* (141 F.3d 1185) the Court upheld UPS' decision to fire a mechanic with hypertension because his blood pressure exceeded the safety standards for commercial vehicle drivers." The effect of these three decisions was to substantially reduce the number of individuals who could claim ADA protections.

Toyota further reduces the number of ADA-covered individuals by developing the meaning of "substantially limited." By limiting the scope of manual tasks to those of "central importance to most people's daily lives" and by drawing a distinction between common workplace injuries and permanent disability, the Toyota decision has raised the

threshold of what an individual must demonstrate in order to establish that he/she is "disabled" under the ADA and, as a result, entitled to reasonable accommodation. Absent a "disability," an employer is under no obligation to provide an accommodation.

This case was one of the most talked about this term because it involved a very real issue to many employers and employees: Does carpal tunnel syndrome rise to the level of a disability protected by the ADA if it prevents an employee from performing only a small range of job positions as opposed to preventing an employee from performing daily life activities?

The opinion does not say that carpal tunnel syndrome could never amount to a disability under the ADA. But it offers an analysis of the syndrome that makes such a finding unlikely. It noted that the symptoms of this condition vary widely from person to person and cited

**The Court declares that if workers are not substantially limited in performing tasks such as brushing their teeth, bathing, doing laundry, which are central to their daily lives, they do not have disabilities.**

studies showing that many cases of carpal tunnel syndrome are mild or short-lived. According to the Court, "Given these large potential differences in the severity and duration of the effects of carpal tunnel syndrome, an individual's carpal tunnel syndrome diagnosis, on its

own, does not indicate whether the individual has a disability within the meaning of the ADA."

Employees must show that they are not only impaired on the job but also can't function normally at home before they fall under the ADA. This case opens a new door for employers, who can now inquire about activities outside the workplace in an effort to determine whether an employee is disabled under the ADA.

Interestingly, the Supreme Court expressed skepticism that "working" should be considered a major life activity and left that question for another day. Also, the case is not over for Toyota. It is headed back to the 6<sup>th</sup> Circuit Court of Appeals for reconsideration of Williams' ADA claims based on a more restrictive view of the definition of "disability." On remand, the issues of whether Williams was substantially limited in the major life activities of working or lifting may resurface.

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**Please Note:** In Connecticut an employee who might not be considered disabled within the meaning of the ADA, may still be considered disabled under state law. In a recent Connecticut federal court case, a plaintiff with arthritis, diabetes, a thyroid deficiency and fibromyalgia was found not to be disabled under ADA, but her case was allowed to go to a jury on state disability law claims. According to the ruling on the summary judgment motion, "To be 'disabled' under Connecticut law is different from being 'disabled' under the ADA...To be disabled under Connecticut law, one needs 'any chronic physical handicap, infirmity or impairment....' Neither the state statute nor the ADA defines 'chronic.'" [*Shaw v. Greenwich Anesthesiology Assocs., P.C.*, 137 F.Supp.2d 48 and 2002 WL 550045(D. Conn.)] At trial, the federal jury awarded \$785,000 in back pay and compensatory damages; a ruling in a post-trial motion awarded the plaintiff \$150,000 in attorney fees.

Given the state's more expansive definition of "disability," the most likely effect of *Toyota* in Connecticut will be to refocus attorneys for both employers and employees on state law.

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(Continued on page 4)

## **U.S. Airways v. Barnett**

### **Case Facts**

In 1990, Robert Barnett injured his back while working in a cargo-handling position at U.S. Airways, Inc. He invoked seniority rights and transferred to a less physically demanding mailroom position. Under U.S. Airways' seniority system, that position, like others, periodically became open to seniority-based employee bidding. In 1992, Barnett learned that at least two employees senior to him intended to bid for the mailroom job. He asked U.S. Airways to accommodate his disability-imposed limitations by making an exception that would allow him to remain in the mailroom. After permitting Barnett to continue his mailroom work for five (5) months while it considered the matter, U.S. Airways eventually decided not to make an exception. Barnett ended up losing his job.

Barnett then brought suit claiming, among other things, that he was an "individual with a disability" capable of performing the essential functions of the mailroom job, that the mailroom job amounted to a "reasonable accommodation" of his disability, and that U.S. Airways, in refusing to assign him the job, unlawfully discriminated against him.

U.S. Airways filed a motion for summary judgment contending that its "well-established" seniority system granted other employees the right to obtain the mailroom position. The district court granted the motion stating that to alter the company's policy "would result in undue hardship to both the company and its non-disabled employees." The appellate court (9<sup>th</sup> Circuit) reversed. In its opinion, the presence of a seniority system is only one factor in the undue hardship analysis. The appellate court held that a case-by-case fact intensive analysis is required to determine whether any particular reassignment would constitute an undue hardship to the employer.

The Supreme Court reversed the appellate court decision.

### **Case Analysis**

The issue: *Does the ADA require an employer to reassign a disabled employee to a position as a "reasonable accommodation" even though another employee is entitled to hold the position under the employer's bona fide and established seniority system? In other words, does a disabled employee's demand for an accommodation trump an employer's seniority system?*

Barnett and U.S. Airways applied the statutory ADA language to seniority systems in radically different ways. In the airline company's view, the fact that an accommodation would violate the rules of a seniority system always shows that the accommodation is not a "reasonable" one. In Barnett's polar opposite view, a seniority system violation never shows that an accommodation sought is not a "reasonable" one. In his opinion, whether a violation of seniority rules would cause "undue hardship" for the employer is a matter for an employer to demonstrate on a case-by-case basis.

According to the Court, the typical seniority system provides important employee benefits by creating, and fulfilling, employee expectations of fair, uniform treatment. These benefits include job security and an opportunity for steady and predictable advancement based on objective standards. The Court stated, "We can find nothing in the statute that suggests Congress intended to undermine seniority systems." Having said that, the Court went on to say that an employee "nonetheless remains free to show that special circumstances warrant a finding that despite the presence of a seniority system... the requested 'accommodation' is 'reasonable' on the particular facts." In other

words, special circumstances might alter the important employee expectations described above.

The Court gave an example of an employer who, having retained the right to change the seniority system unilaterally, exercised that right fairly frequently, thus reducing employee expectations that the system would be followed to the point where one more departure—needed to accommodate an individual with a disability—would not likely make a difference. In this situation, the employee bears the burden of showing that making an exception for him or her would not significantly upset employees' expectations about seniority. The employee must explain why, in his or her particular case, an exception to the employer's seniority policy can constitute a "reasonable accommodation" even though in the ordinary case it cannot.

### **Bottom Line**

The ADA requires the employer and the individual with a disability who has need of an accommodation to engage in an interactive process to determine an appropriate reasonable accommodation. Barnett's original suit alleged that U.S. Airways failed to engage in this process and the appellate court had determined that employers are obligated to use the

**According to the Court, "special circumstances" in particular cases of disability may override seniority, but not "in the normal run of cases."**

interactive process in determining reasonable accommodations. U.S. Airways requested a review of that determination, which the Supreme Court declined.

The Court only examined the issue of whether a seniority system trumps the requirements of the ADA. (This case involved a company-created seniority system versus a collectively bargained one; however, the Court did not distinguish between the two.) *Barnett* is a compromise decision. Although it creates a presumption in favor of established seniority systems, employers cannot rely solely on seniority systems based on this decision.

The majority opinion spelled out special circumstances in which a disabled worker could overcome that presumption in a claim seeking a reasonable accommodation, i.e., frequent exceptions to the seniority system in the past. Employers can expect to see substantial discovery over how their seniority systems have been employed in the past and what exceptions have been made.

Because the U.S. Airways' Policy Guide stated that the company "reserved the right to change any and all" portions of the seniority system at will, the Supreme Court remanded the case to the 9<sup>th</sup> circuit for reconsideration in light of the new ruling.

The message of this decision: Employers must avoid making exceptions to their seniority systems or they will open the door to arguments that it would be reasonable to violate their seniority systems to accommodate disabled employees.

**Next Month:** The U.S. Supreme Court's first FMLA ruling, *Ragsdale v. Wolverine Worldwide, Inc.*, a case striking down the U.S. Department of Labor regulation allowing employees to take more than the 12 weeks of leave per year if they do not receive proper notice.

**FMLA Is HR Managers' No. 1 Headache** — [Hrnext.com](http://Hrnext.com), a website that serves human resource professionals, asked HR people which government regulations give them the biggest headache. The No. 1 choice — by far — was the Family and Medical Leave Act (FMLA), which took 51% of the vote. The next choice, affirmative action, wasn't even close; it received only 15%. The other contenders: ADA, 9%; ERISA (which insures that employees receive the pensions and other benefits promised to them), 9%; OSHA, 8%; COBRA (which allows ex-employees to continue receiving health insurance through their former employers at group rates), 8%.... **"A Workplace Divided"** — A new national survey of 1,000 employees, conducted in the fall of 2001, finds that black and white Americans have fundamentally different views of the workplace — both in how people perceive and experience discrimination, and what they want done about it. "*A Workplace Divided: How Americans View Discrimination and Race on the Job*" is the latest survey in the public multi-year research project, "*Work Trends*," jointly directed by the University of Connecticut and Rutgers University. White employees are for more likely than employees of other races to believe that everyone is treated fairly. Half of black employees believe that blacks are the most likely ethnic group to be treated unfairly in the workplace, compared to just 10% of whites and 13% of employees of other races. In contrast to many findings from the previous studies in the "*Work Trends*" series, where Americans sought government and employers to work in partnership with them on improving their skills and workplaces, "*A Workplace Divided*" finds employees now believe that discrimination is a matter for employers to address within the workplace — and not government. However, minority employees are dissatisfied with how employers are addressing this issue. Only 61% of black employees feel that their employer takes discrimination seriously, compared with 86% of white employees and nearly 75% of employees of other races. To read the study, go to [www.heldrich.rutgers.edu](http://www.heldrich.rutgers.edu). Click on "What's New.".... **Employment Discrimination Plaintiffs Fare Far Worse than Defendants on Appeal** — A recent analysis of government-compiled data shows that federal courts of appeal overturn judgments in favor of employment discrimination plaintiffs at a dramatically higher rate than they do decisions in favor of employers. The study, conducted by Cornell law professors, found that when a plaintiff wins at trial and the employer appeals, nearly 44% of those judgments are reversed. In contrast, less than 6% of appealed employer victories are overturned. This gap (38% points) between employee and employer reversal rates in workplace discrimination cases is larger than in any other type of cases and is a nationwide phenomenon. It exists for all circuits throughout the country. The highest reversal rate for decisions in favor of employees is in the 5<sup>th</sup> Circuit (LA, MS, TX) — 61%; the lowest reversal rate for decisions favoring employers is in the 1<sup>st</sup> Circuit (ME, MA, NH, RI, PR) — 0%. In the 2<sup>nd</sup> Circuit (which covers Connecticut), the reversal rates are 43% and 7% respectively. To read the full study, go to: [www.findjustice.com/ms/civil-just/schwab-report.htm](http://www.findjustice.com/ms/civil-just/schwab-report.htm).... **EEOC Issues Fiscal 2001 Enforcement Data** — According to the U.S. Equal Employment Opportunity Commission, total discrimination charges filed against private employers and state and local governments increased one percent from the previous year to 80,840—the highest level since the mid-1990s. The types of discrimination with the highest rate of increase in Fiscal Year 2001 (October 1, 2000 through September 30, 2001), compared to the prior year, were

allegations of discrimination based on age (1.5% increase) and disability (.5% increase). All other types of charge filings either declined slightly or remained level compared to FY 2000. The data is posted online at [www.eeoc.gov/stats/enforcement.html](http://www.eeoc.gov/stats/enforcement.html) or [www.eeoc.gov/press/2-22-02.html](http://www.eeoc.gov/press/2-22-02.html). In the disability category, charges alleging discrimination based on a "record of disability" or being "regarded as" disabled jumped from .5% of claims and 2.7% of claims respectively in 1994 (the first year that these complaints were registered) to 5.1% and 13.9% in 2001. In 1994, 11 individuals were awarded a total of \$175,005 for "record of disability" complaints and 58 individuals were awarded \$815,435 for "regarded as" complaints. In 2001, these figures were 262 individuals/\$2,360,411 in awards and 602 individuals/\$9,206,991 in awards. For the full charts go to: [www.eeoc.gov/stats.ada.html](http://www.eeoc.gov/stats.ada.html).... **Workplace Regs Cost \$91 Billion Annually** — A report released by the Mercatus Center, a research group at George Mason University in Fairfax, Virginia, estimates that workplace regulations cost about \$91 billion per year. Included in the report are regulations that govern employee benefits, occupational safety and health, civil rights, labor standards and other employment programs. For each regulatory category, the report also includes high and low estimates, as well as "best estimates" of the cost. The range between the lower and upper estimates is significant — between a high of \$134.4 billion and a low of \$51.9 billion — and is driven in large part by the wide range in estimates for the Occupational Safety and Health category — \$64.6 billion and \$15.0 billion. The full report can be found at [www.mercatus.org/news/Workplace.pdf](http://www.mercatus.org/news/Workplace.pdf).... **OSHA Announces Comprehensive Plan to Reduce Ergonomic Injuries** — On April 5, 2002, the Occupational Safety and Health Administration (OSHA) unveiled a comprehensive plan designed to reduce ergonomic injuries through a combination of industry-targeted guidelines, enforcement measures, workplace outreach, advanced research and dedicated efforts to protect Hispanic and other immigrant workers, many of whom work in industries with high ergonomic hazard rates. According to the Labor Secretary, the new plan will prevent ergonomics injuries before they occur and reach a larger number of at-risk workers than the original standard, which was repealed by a joint resolution of Congress last March. (Refer to *In Brief*... "New Ergonomics Standard Repealed," Spring '01 issue of *What's News*, p. 5.) For more information on the new guidelines, go to: [www.osha.gov/ergonomics/index.html](http://www.osha.gov/ergonomics/index.html).... **More OSHA** — After seven years, OSHA withdrew a proposal that would have banned smoking in almost all workplaces. The proposal had faced widespread opposition. The decision was reached with the support of major anti-smoking public health groups including the American Heart Association, the American Cancer Society, the American Lung Association (ALA), Americans for Nonsmokers' Rights and the Campaign for Tobacco-Free Kids. According to the ALA, since 1994 there has been a 50% increase in workplaces that have a smoke-free policy. Today, nearly 70% of employees work in businesses that have instituted smoke-free workplace policies. Since states, local communities and private employers have taken action on their own, OSHA determined that the urgency for federal action that once existed has changed. However, according to the Assistant Secretary for OSHA, the withdrawal of the proposal "does not preclude future agency action if the need arises." [[www.osha.gov/media/oshnews/dec01/trade-20011214.html](http://www.osha.gov/media/oshnews/dec01/trade-20011214.html)]

### Diversity Training

The Commission on Human Rights and Opportunities (CHRO) reports that to date approximately 33,000 (of a total of approximately 58,000) full- and part-time state employees have received diversity training as mandated by Public Act 99-180, "An Act Concerning Diversity Training for State Employees," and Public Act 01-53, "An Act Concerning State Agency Affirmative Action Plans and Diversity Training." Agencies reported expenditures for the training thus far to be almost \$2,000,000.

In its second summary report to the General Assembly regarding the mandated diversity training, "Workplace Diversity in the 21<sup>st</sup> Century," CHRO includes not only quantitative information, but also attempts to assess the qualitative impact of the diversity training. Agencies were asked to report on discernible improvements in their work environments and in the quality of service provided to customers.

The deadline for agencies to complete the diversity training was extended from January 1, 2001 to July 1, 2001. In addition to the six state-approved diversity vendors, the Department of Administrative Services' HR Learning Center will offer two separate sessions on the core diversity training – June 12 and July 24. The HR Learning Center offers the following four courses to agencies interested in training beyond that required in the core session:

- *Managing Multicultural Work Teams*
- *The Black Experience*
- *The Puerto Rican Experience*
- *Strategies for Improving Customer Service*

For further information on how to register for one of these courses, please contact Kathleen Sullivan at (860) 713-5231. If you have any questions regarding the "Workplace Diversity in the 21<sup>st</sup> Century" report, please contact Patricia Jackson at (860) 541-3439 or e-mail Ms. Jackson at [patricia.jackson@po.state.ct.us](mailto:patricia.jackson@po.state.ct.us).

### Title VII

### U.S. Supreme Court Lowers Hurdle for Employees in Job-Bias Claims

*In a pair of recent decisions, the U.S. Supreme Court made it easier for workers to bring bias claims against their employers:*

**Case #1:** In *Swierkiewicz v. Sorema* (No. 00-1853), decided February 26, 2002, the Supreme Court unanimously ruled that employees do not have to present direct evidence of discrimination when first filing a lawsuit in order to survive a motion to dismiss. According to the Court, the complaint must contain "only a short and plain statement of the claim showing that the pleader is entitled to relief."

When his employer – a French-owned company – fired Akos Swierkiewicz, a 53-year-old native of Hungary, he filed a lawsuit alleging national origin and age discrimination. The district court dismissed the complaint, finding that Swierkiewicz did not adequately allege a prima facie case of discrimination. In employment law, the legal term "prima facie" describes a lawsuit that will prevail based on its merits unless contradicted by other evidence. The 2<sup>nd</sup> Circuit Court of Appeals (which covers Connecticut) affirmed the lower court decision, relying on its settled precedent requiring an employment discrimination complaint to allege facts constituting a prima facie case of discrimination. According to the 2<sup>nd</sup> Circuit, Swierkiewicz had failed to meet his burden because his allegations were insufficient as a matter of law to raise an inference of discrimination.

Swierkiewicz argued that the 2<sup>nd</sup> Circuit improperly imposed a heightened pleading standard in employment cases that it does not impose in other civil cases. Sorema argued that the 2<sup>nd</sup> Circuit's standard is a valid way of discouraging unsubstantiated lawsuits that are based on nothing but conclusory allegations. The Court rejected Sorema's defense, saying whatever the practical merits of its argument, the Federal Rules do not contain a heightened pleading standard for employment discrimination suits.

The case can be found at <http://supct.law.cornell.edu/supct/html/00-1853.ZO.html> (text format) or <http://supct.law.cornell.edu/supct/pdf/00-1853P.ZO> (pdf format, requiring Adobe Acrobat).

**Case #2:** On March 19, 2002, in *Edelman v. Lynchburg College* [228 F.3d 503], the U.S. Supreme Court ruled that complaints to the Equal Employment Opportunity Commission (EEOC) do not have to be sworn statements to be official. Under the EEOC's regulations, an employee claiming employment discrimination can satisfy the requirement that a charge be filed within 180 or 300 days by filing an informal, unverified charge; as long as the employee subsequently verifies the information contained in the charge under oath, the verified charge relates back to the original, informal filing.

Approximately six (6) months after Lynchburg College denied academic tenure to Leonard Edelman, he faxed a letter to the EEOC, claiming gender-based, national origin and religious discrimination. Edelman made no oath or affirmation. The EEOC advised him to file a charge within the applicable 300-day time limit and sent him the appropriate form, which he returned 313 days after he was denied tenure. A federal court ruled that failure to file the verified form within the applicable filing period barred Edelman's court action. Edelman replied that his original letter was a timely filed charge and that under EEOC regulations, the verification form related back to the letter.

A federal district court dismissed the complaint and the appellate court affirmed. The U.S. Supreme Court reversed, stating that the EEOC's policy of allowing unsworn complaints is reasonable. The time limitation (300 days) is meant to encourage a potential charging party to raise a discrimination claim before it gets stale, while the verification requirement is intended to protect employers from the disruption and expense of responding to a claim unless a complainant is serious enough and sure enough to support it by oath which would subject the complainant to liability for perjury. To further this later goal, however, the charge needs to be verified only by the time the employer is obliged to respond to the charge, not at the time an employee files it with the EEOC.

The case can be found at <http://supct.law.cornell.edu/supct/html/00-1072.ZO.html> (text format) or <http://supct.law.cornell.edu/supct/pdf/00-1072P.ZO> (pdf format, requiring Adobe Acrobat).

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## What's News Delivered Electronically

Beginning with the summer issue, *What's News* will be delivered electronically to your e-mail box. You'll be able to read the latest issue of the newsletter, right on your computer screen, the very day it's sent to the printer. You can download it and print a copy before it's off the presses! To do so, however, we must establish a special listserv. Please help us by sending a e-mail message to [imailsrv@list.state.ct.us](mailto:imailsrv@list.state.ct.us) with the following in the body of the message:

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In addition to making it possible for you to receive the latest issue of *What's News*, the listserv will enable us to send you special alerts and updates on other items of interest.

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**Q** *Can an employee who is on FMLA leave work another job?*

**A** Although conventional wisdom would seem to say that if the employee is too sick to work, he or she is too sick to do anything else, the answer is that it depends on the employer's policy. As long as the employer does not have a policy forbidding its employees to perform work for another employer, there may be situations where outside employment is allowed. Consider the following situations (which assume no employer policy prohibiting second employment).

**Situation #1:** Employee needs family leave during normal work hours to care for a seriously ill child, spouse or parent. Sometime during the afternoon another relative is able to take over the care responsibilities. The employee is now able, if she chooses, to work evenings/nights at another job.

**Situation #2:** Employee is absent for his own serious health condition. He is having severe back pain. One of the main functions of the employee's job is to lift heavy equipment. His doctor has prescribed rest and no lifting of any kind for one month. The employee has an opportunity to work in a desk job on a temporary basis for another employer during that period of time. He is allowed to work the desk job.

U.S. Department of Labor's (DOL) Letter Ruling #106 (July 19, 1999) deals with this issue. It is the DOL's position that an employee on FMLA leave continues to have an employment relationship with the employer. Consequently, the employer's employment policies continue to apply to an employee on FMLA leave in the same manner as they would apply to an employee who continues to work, or is absent while on some other form of leave. Absent an employer policy prohibiting outside employment, the employee may do as he/she chooses while on FMLA leave. If an agency is

suspicious about an employee's medical certification, require a second opinion. Don't settle for a single doctor's note.

**Q** *Under FMLA is it permissible to ask an employee with a chronic, lifelong condition – such as asthma, gout, diabetes, etc. – to provide recertification every six (6) months?*

**A** According to the FMLA regulations [C.F.R. Sec. 308(a)], for pregnancy, chronic, or permanent/long-term conditions under the continuing supervision of a health care provider, an employer may request recertification no more often than every 30 days and only in connection with an absence by the employee.

**Example:** The employee's doctor says that the employee will be absent 2-3 times a month for a period of 3-4 hours each time. In the first month, the employee is out three times. In the second and third months, the employee has no FMLA-related absences. The agency may not ask for recertification.

However, the employee has an FMLA-related absence during the second week of the fourth month. It is at this point that the agency can ask for recertification. If the agency does not ask for a recertification at this point and the employee has no absences in months five and six, then the agency may not ask for a recertification in month six. The agency must wait until the employee is absent for his/her FMLA-qualifying reason. [There are exceptions to this rule: (The employer is permitted to request recertification prior to the 30 days IF (1) circumstances significantly changed from those described in the medical certification (e.g., the duration or frequency of absences) or (2) the employer receives information that places doubt on the employee's stated reason for the absence.]

## You decide...

No. The 2<sup>nd</sup> Circuit Court of Appeals (which covers Connecticut) affirmed the lower court's decision. The court first noted that to prove her claim under the Americans with Disabilities Act (ADA), the employee was required to show that she could perform the essential functions of the job with reasonable accommodation. She also had to identify an accommodation, "the costs of which, facially, do not clearly exceed its benefits." The question of whether a requested accommodation is reasonable is "fact-specific" and must be evaluated on a "case-by-case basis." Although the lower court had stated flatly that "the replacement of a supervisor is not a plausible accommodation," the 2<sup>nd</sup> Circuit did not agree. Instead, the court set forth the rule as follows: "There is a presumption, however, that a request to change supervisors is unreasonable, and the burden of overcoming that presumption (i.e., of demonstrating that, within the particular context of the plaintiff's workplace, the request was reasonable) lies with the plaintiff." According to the court, the employee did not meet her burden of identifying an accommodation where costs did not exceed benefits: (1) the employee did not present facts to prove that in her workplace, a change of supervisors could be accomplished without excessive organization costs; and (2) her request was not simply for reassignment to a different supervisor, but also for protection from any interaction with him. The employee appealed to the U.S. Supreme Court and her petition was denied. [Kennedy v. Dresser Rand Co., 193 F.3d 120 (1999)]

*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.

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**DAS**

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