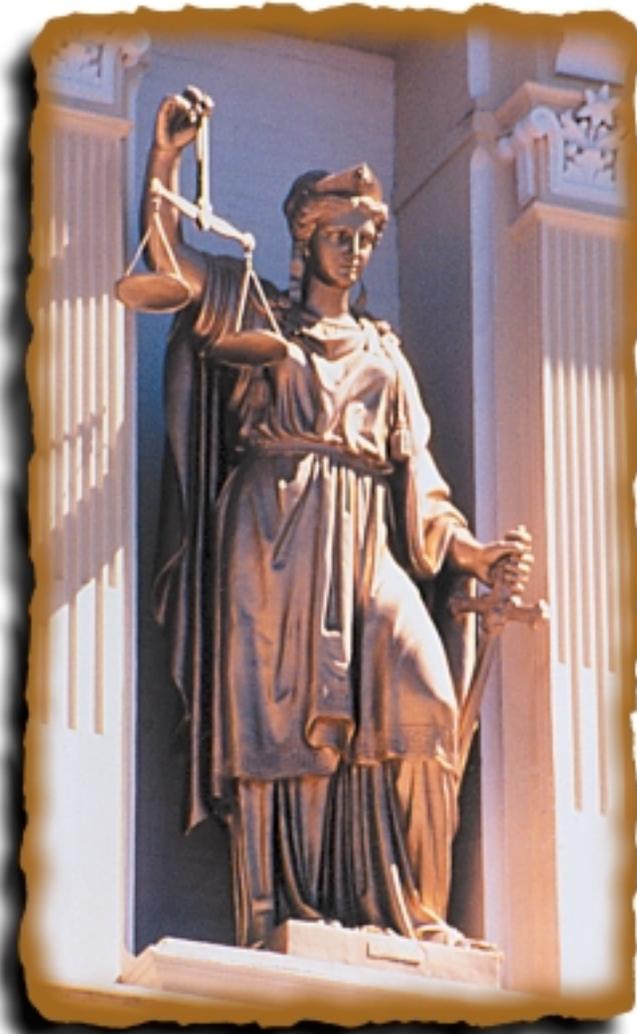


*2<sup>nd</sup>*  
**LABOR AND EMPLOYMENT  
LAW SEMINAR**



**KAMER ZUCKER & ABBOTT**

**May 12, 2000**

# NEW DEVELOPMENTS - FEDERAL AND STATE LAW

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## I. SUPREME COURT.

### A. *Sexual Discrimination.*

Kolstad v. American Dental Ass'n, 527 U.S. 526, 119 S. Ct. 2118 (1999). An employer's conduct does not have to be "egregious" in order for a plaintiff to collect punitive damages under the Civil Rights Act of 1991, which authorizes punitive damages in intentional bias cases when a defendant has acted "with malice or with reckless indifference to the federally protected rights of an aggrieved individual." According to the Court, the terms "malice" and "reckless" ultimately focus on the actor's state of mind. Although egregious misconduct is evidence of the requisite mental state, the law does not "require a showing of egregious or outrageous discrimination independent of the employer's state of mind." Rather, the terms "malice" or "reckless" pertain to only the employer's knowledge that it may be acting in violation of federal law.

Further, the Court determined that an employer that has made a good faith effort to comply with Title VII cannot be held vicariously liable for punitive damages based on the discriminatory actions of its managers. While an employer can be strictly liable for the discriminatory actions of its supervisors under Title VII, the court noted that common-law agency principles dictate that it is not proper to assess punitive damages against someone who is "personally innocent" and indirectly liable.

### B. *Americans With Disabilities Act.*

Sutton v. United Airlines, Inc., 527 U.S. 471, 119 S. Ct. 2139 (1999); Murphy v. United Parcel Serv., Inc., 527 U.S. 516, 119 S. Ct. 2133 (1999). In a pair of 7-2 decisions, the Supreme Court held that an analysis of whether an individual is disabled under the Americans with Disabilities Act should include consideration of measures that mitigate the impairment, such as eyeglasses or medication. The Equal Employment Opportunity Commission and the Department of Labor had been operating under interpretive guidelines providing that a determination of whether an individual is substantially limited in a major life activity must be made without regard to mitigating measures.

In overturning the EEOC and DOL guidelines, the Court determined that federal regulatory agencies had no authority to define "disability." When read as a whole, the Court held, the ADA requires that an individual be "presently" substantially limited in a major life activity. When mitigating measures enable an individual to function normally, he/she is not protected by the ADA. Building on these two decisions, the Supreme Court also held that a person with monocular vision was not considered *per se* disabled under the ADA, because of the many possible variations in vision loss and the individual's "ability to compensate for the impairment." Albertsons, Inc. v. Kirkingburg, 527 U.S. 555, 119 S. Ct. 2162 (1999). While the Court agreed that people with monocular vision would ordinarily meet the ADA's definition of disability, it noted that "we see no principled basis for distinguishing between measures undertaken with artificial aids, like medications and devices, and measures undertaken, whether consciously or not, with the body's own systems."

Cleveland v. Policy Management Sys. Corp., 526 U.S. 795, 119 S. Ct. 1597 (1999). Reversing a Fifth Circuit decision, the Supreme Court held that a plaintiff can still sue under the ADA even though she received Social Security disability benefits. After suffering a stroke and losing her job, petitioner sought and obtained Social Security Disability Insurance (SSDI) benefits, claiming that she was unable to work due to her disability. The week before her SSDI award, she filed suit under the ADA, contending that her employer had discriminated against her on account of her disability. Lower courts held that by contending she was totally disabled for SSDI purposes, petitioner was estopped from proving an essential element of her ADA claim; namely, that she could perform the essential functions of her job, at least with "reasonable . . . accommodation." The Supreme Court held that, though facially inconsistent, there are instances in which an SSDI claim and an ADA claim can comfortably exist side-by-side. For example, as the Social Security Administration does not take into account the possibility of reasonable accommodation in determining SSDI eligibility, an ADA plaintiff's claim that she can perform her job with reasonable accommodation may well prove consistent with an SSDI claim that she could not perform her own job without it. However, though not

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automatically estopped by the pursuit and receipt of SSDI benefits, the Court held that in order to survive summary judgment, a plaintiff must explain why her SSDI contention that she is unable to work is consistent with her ADA claim that she can perform the essential functions of her job, at least with reasonable accommodation.

### ***C. Wrongful Discharge.***

Creating a new cause of action for whistleblowers, the Supreme Court, in Huddle v. Garrison, 525 U.S. 121, 119 S. Ct. 489 (1998), held that where an employee is deterred from testifying in a federal investigation by two or more supervisors acting together, the employee can sue for damages and attorneys' fees under the Civil Rights Act of 1871. The Act, in part, prohibits two or more persons from injuring another "in their person or property" due to their giving testimony in federal court. A federal grand jury indictment charged petitioner's employer with Medicare fraud, and petitioner cooperated with federal agents in the investigation preceding the indictment. Three officers of the employer conspired to bring about petitioner's termination, both to intimidate petitioner and to retaliate against him for his participation in the federal investigation. The Court determined that such conspiracy to interfere with another's employment relationship was the type of action contemplated by the Civil Rights Act of 1871, even if an employee is at-will and has no actual property interest in his job.

### ***D. ERISA.***

Hughes Aircraft Co. v. Jacobsen, 525 U.S. 432, 119 S. Ct. 755 (1999). Reversing the Ninth Circuit, the Court held that a company does not violate the Employee Retirement Income Security Act (ERISA) when it uses a pension plan surplus to provide retirement benefits to other workers. The Court determined that pension beneficiaries have a vested right only to those accrued benefits dedicated to their individual accounts, not to the plan's funds as a whole. As such, members have no entitlement to share in a plan's surplus - - even if it is partially attributable to the investment growth of their contributions.

### ***E. State Immunity from Employment Actions.***

Whether state entities can be subject to suits brought by employees under various employment statutes has become a significant question over the past year. At issue is the Supreme Court's decision in Seminole Tribe of Florida v. Florida, 517 U.S. 44, 116 S. Ct. 1114 (1996), which provides

the test for determining whether Congress has effectively abrogated the states' Eleventh Amendment immunity from suit, through its Fourteenth Amendment enforcement powers. During the current term, the Supreme Court has determined that states are immune from suits brought by employees under the Fair Labor Standards Act and under the Age Discrimination in Employment Act. Alden v. Maine, 527 U.S. 706, 119 S. Ct. 2240 (1999) (FLSA); Kimel v. Florida Bd. of Regents, — U.S. —, 120 S. Ct. 631 (U.S. 2000) (ADEA). The controversy will likely continue to surround other federal employment statutes such as the Americans With Disabilities Act and the Family and Medical Leave Act.

## **II. UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.**

### ***A. Sexual Discrimination and Harassment.***

Gotthardt v. National Railroad Passenger Corp., 191 F.3d 1148 (9<sup>th</sup> Cir. 1999). Addressing an issue of first impression, the Ninth Circuit held that front pay is an equitable remedy not subject to the compensatory damages cap under Title VII. Front pay is a monetary award intended to compensate a victim for future economic losses likely to be suffered from the time of judgment to the time a victim can assume a new job position that is equivalent to or better than the victim's previous job. The Gotthardt case involved an assistant engineer employed by Amtrak who developed Post Traumatic Stress Disorder ("PTSD") after being subjected to a hostile work environment that forced her to quit her job. The trial court awarded \$603,928.37 in front pay, representing the pay and benefits Gotthardt, who was age 59 at the time of the award, would have received until she reached Amtrak's mandatory retirement age of 70. The Gotthardt case significantly raises the stakes in Title VII and ADA cases where the plaintiff can show that hiring or reinstatement would be impractical or inappropriate.

Montero v. AGCO Corp., 192 F.3d 856 (9<sup>th</sup> Cir. 1999). Applying last year's U.S. Supreme Court decision in Faragher v. City of Boca Raton, 524 U.S. 775, 118 S. Ct. 2275 (1998), the Ninth Circuit held that a company clerk, whose sexual harassment allegations were promptly investigated and decisively resolved by her employer, failed to state a claim under Title VII of the Civil Rights Act of 1964. Faragher and its companion case, Burlington Industries, Inc. v. Ellerth, 424 U.S. 722, 118 S. Ct. 2257 (1998), established that an employer is vicariously liable for sexual harassment by a supervisor which causes a hostile work environment.

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If the employee suffers no tangible employment action, such as firing, demotion, or failing to promote, the employer may raise an affirmative defense which requires that the employer show that it acted reasonably in its attempts to prevent and promptly correct any sexually harassing behavior, and that the employee unreasonably failed to take advantage of these measures or to otherwise avoid harm. In *Montero*, the Ninth Circuit determined the employer satisfied the first prong of the defense, because even though the employee was subjected to a longstanding pattern of harassment, her employer responded within eleven days after the employee finally complained to management. The employer likewise satisfied the second prong of the affirmative defense by showing that the clerk, who waited almost two years to complain, unreasonably failed to take advantage of the company's preventative and corrective opportunities.

*Stoll v. Runyon*, 165 F.3d 1238 (9<sup>th</sup> Cir. 1999). The court held that a woman's depression was grounds to equitably toll the statute of limitations on her Title VII claim, even though she was represented by counsel in the proceedings. Cynthia Stoll was subjected to severe and pervasive sexual harassment from numerous male coworkers and supervisors and was even raped on one occasion. The harassment left the woman unable to read, open mail, or function in society, and, because of anxiety and fear of men resulting from the harassment, she was required to communicate with her attorney indirectly through her psychiatrist's office. The court held that Stoll was entitled to equitable tolling inasmuch as her failure to timely file a lawsuit occurred as a direct result of the sexual harassment upon which this suit was based.

*Bollard v. The California Province of the Society of Jesus*, 196 F.3d 940 (9<sup>th</sup> Cir. 1999). The Ninth Circuit reversed a lower court's dismissal, and held that a man studying for the priesthood could bring suit under Title VII when he was sexually harassed by several priests. Under Title VII, religious organizations can benefit from what is termed as the "ministerial exception," *i.e.*, under the First Amendment's Establishment and Free Exercise clauses, a religious organization is precluded from the mandates of Title VII when disputed employment practices involve a church's freedom to choose its ministers or to practice its beliefs. In this case however, the court found that the order could not offer a religious justification for the alleged harassment. In fact, the order condemned the harassment as inconsistent with its religious beliefs.

## ***B. Americans With Disabilities Act.***

*Willis v. Pacific Maritime Ass'n*, 162 F.3d 561 (9<sup>th</sup> Cir. 1998). Under the ADA, an employer is not obligated to re-assign an employee to light-duty work if this accommodation would violate the seniority rules of a collective bargaining agreement. Injured longshore employees brought an action alleging that the employer's association and union violated the Americans with Disabilities Act by failing to provide them with light-duty work. The association and union responded that they could not provide such work without violating seniority provisions of the collective bargaining agreement. Joining a strong trend among the circuits, the Ninth Circuit determined that such an accommodation would be *per se* unreasonable where, as in this instance, the collective bargaining agreement contains *bona fide* seniority provisions.

*Zimmerman v. State of Oregon, Department of Justice*, 170 F.3d 1169 (9<sup>th</sup> Cir. 1999). Where a public employee sues under the ADA, the court determined that he cannot go "straight to court" and avoid the administrative remedies provisions of Title I of the ADA. Under Title I of the ADA, which governs employment, a complainant is required to first file a claim with the Equal Employment Opportunity Commission ("EEOC") before he can file suit in either federal or state court. Recently, other courts have allowed public employees to skip the ADA's administrative remedies by suing under Title II, which governs access to public entities. In dismissing petitioner's suit, the court determined that allowing employment discrimination claims under Title II would make Title I completely redundant as applied to public employees. The court questioned, "After establishing a comprehensive statutory scheme in Title I to prohibit discrimination by both public and private employers, why would Congress then create a vague implied remedy for employment discrimination, available only to public employees?"

*McAlindin v. County of San Diego*, 192 F.3d 1226 (9<sup>th</sup> Cir. 1999). The court determined that an impotent worker is disabled within the meaning of the Americans with Disabilities Act. The employee at issue was diagnosed with anxiety, panic, and somatoform disorders and the medication which the employee took for these disorders had the unfortunate side effect of rendering him impotent. The employee brought an action against the county alleging discrimination in violation of the Americans with Disabilities Act. In addressing the county's contention that the employee was not disabled, the court held that, like

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procreation, sexual activity is a major life activity within the meaning of the ADA. Because his medication made him impotent, the court determined that he was substantially limited in the major life activity of sex.

### **C. Racial Discrimination.**

Pavon v. Swift, 192 F.3d 902 (9<sup>th</sup> Cir. 1999). An Hispanic truck mechanic who was verbally abused by a coworker, and then fired when he complained about it, was entitled to a \$550,000 jury verdict. Non-economic compensatory or punitive damages for claims brought under Title VII of the Civil Rights Act of 1964 are normally capped at \$300,000. However, the Ninth Circuit held that because plaintiff sued under both Title VII and the Civil Rights Act of 1866, which does not impose a ceiling on damages, he could recover the full amount awarded by the jury. The court also rejected the employer's contention that the employee was harassed because of his national origin, not his race, and therefore could not assert protection under the Civil Rights Act of 1866 (§ 1981 claim). The court believed the employee's harasser "considered Pavon to be of a different race than himself and chose to harass Pavon based on his ancestry and ethnic characteristics."

### **D. Religious Discrimination.**

Balint v. Carson City, 180 F.3d 1047 (9<sup>th</sup> Cir. 1999). The existence of a seniority system does not relieve an employer's duty to attempt a reasonable accommodation of its employees' religious practices. After passing a battery of physical and psychological tests, a woman was hired as a sheriff's deputy and told to report to work for a shift that conflicted with her religious practices. She informed the department that she could not work during her Sabbath and requested that her schedule be adjusted. She offered to split her days off and to work Sundays. After her employer refused to accommodate her, she withdrew her application and sued under Title VII of the Civil Rights Act of 1964. The district court held that in light of the city's *bona fide* seniority-based shift-bidding system, any accommodation given to the woman would cause an automatic undue hardship as a matter of law. The Ninth Circuit declared that while certain provisions of Title VII provide that seniority systems are not illegal employment practices in and of themselves, employers with such systems in place are not exempt from otherwise complying with the requirements of Title VII. Instead, an accommodation should be made as long it can be accomplished without disruption of the seniority system and without more than *de minimis* cost to the employer.

### **E. Age Discrimination.**

Arnett v. California Public Employees Retirement Sys., 179 F.3d 690 (9<sup>th</sup> Cir. 1999). In this case, the Ninth Circuit held that employees stated a claim under the Age Discrimination in Employment Act where the amount of disability benefits they received was based in part on their age when hired. As this case involved public employees suing a state entity, the Ninth Circuit has since vacated this decision in light of Kimel v. Florida Board of Regents, which held that state employers are immune from suits brought under the ADEA. See discussion *supra* at § I.E. It remains to be seen whether the rationale behind the court's decision survives; however, employers should be wary of determining disability benefits based upon a new employee's age at the time of hire.

### **F. Compulsory Arbitration.**

Circuit City Stores, Inc. v. Adams, 194 F.3d 1070 (9<sup>th</sup> Cir. 1999). Continuing its divergent view that the Federal Arbitration Act (FAA) does not apply to employment contracts, the Ninth Circuit rejected Circuit City's motion to compel arbitration of an employee's discrimination claim brought under the California Fair Employment in Housing Act. Adams had completed a six-page application form in October 1995 and signed the attached dispute resolution agreement, which required binding arbitration of all claims and disputes, including claims under federal and state anti-discrimination laws. Signing the arbitration agreement was a condition of employment, and the agreement contained a disclaimer stating that it did not form an employment contract or alter the at-will employment status. Holding that the district court lacked authority to compel arbitration, the Ninth Circuit relied on its 2-to-1 decision in Craft v. Campbell Soup Co., 177 F.3d 1083 (9<sup>th</sup> Cir. 1999), which held that the FAA does not apply to employment contracts or collective bargaining agreements. The Ninth Circuit declined the opportunity to have the full court reconsider Kraft. A majority of the federal appeals courts which have addressed the issue have ruled that the FAA applies to employment contracts, except those covering employees who work directly in interstate commerce. The U.S. Supreme Court has never ruled directly on this issue.

### **G. Secondary Boycotts.**

Pacific Maritime Ass'n v. Local 63, Int'l Longshoremen's and Warehousemen's Union, 198 F.3d 1078 (9<sup>th</sup> Cir. 1999). According to the Ninth Circuit, a union that represents a city's port pilots is exempt from liability

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under the secondary boycott provisions of the Taft-Hartley Act because the union is not a labor organization within the meaning of the Act. The union set up picket lines during a strike following its unsuccessful contract renewal negotiations with the city. As a result, the members of other labor organizations representing private shipping, stevedoring, and terminal companies operating out of the city port, refused to cross the union's picket lines. A multi-employer shipping association sued the union to recover damages at the end of the strike. Looking to the plain unambiguous language of the Act, the court determined that the definition of labor organization excludes an organization of employees of a political subdivision of a state. Because the union represented port pilots employed by the city, it is an organization of employees of a political subdivision of the state, which is not subject to liability for secondary boycott activity.

#### ***H. Union Picketing.***

NLRB v. Calkins, 187 F.3d 1080 (9<sup>th</sup> Cir. 1999). In this decision, the Ninth Circuit clarified when an employer can exert his private property rights to exclude union members from picketing and handbilling on its property. The owners of a California grocery store arrested union representatives who picketed and handbilled on the store's private parking lot. In its defense to unfair labor practice charges, the employer asserted that the U.S. Supreme Court decision in Lechmere, Inc. v. NLRB, 502 U.S. 507, 112 S. Ct. 841 (1992), held that union picketers did not have a protected right to conduct a consumer boycott on private property. In Lechmere, the Supreme Court held that a shopping center owner may validly post his or her property against nonemployee distribution of union literature, except where union representatives do not have reasonable access to employees outside the employer's property. The Ninth Circuit, in deciding Calkins, ignored the Lechmere argument, instead relying on Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 114 S. Ct. 771 (1994), which stated that an employer may look to state law to exclude union organizers. Lechmere was decided as it was, the court argued, because Connecticut law protected a shopping center owner's right to exclude others, including union organizers, as trespassers. In the instant case, however, the Ninth Circuit noted that the California Constitution had been interpreted as protecting reasonably exercised free speech in privately-owned shopping centers and adjacent sidewalks and parking lots. As such, it was reasonable to find that the employer violated the picketers Section 7 rights

by having them arrested. In Nevada, the exact protections afforded free speech around privately-owned businesses and shopping malls is uncertain. However, in Culinary Workers Union v. Eighth Judicial Dist. Court, 66 Nev. 166, 207 P.2d 990 (1949), overruled in part, Vegas Franchises Ltd. v. Culinary Workers Union, 83 Nev. 422, 433 P.2d 263 (1967), the Nevada Supreme Court declared that peaceful picketing of an enterprise or business is the primary means "by which laboring men make known their grievances" and as such, must be given wide protection by state courts. This appears to indicate that in Nevada, an employer cannot prohibit union organizers from picketing or handbilling on property that is open to the general public, even if privately-owned. In a tangentially related case, Venetian Casino Resort, LLC v. Local Joint Executive Board of Las Vegas, 45 F. Supp. 2d 1027 (D. Nev. 1999), the court ruled that the Venetian could not exclude union picketers from its privately owned pedestrian walkway that is parallel and adjacent to a main public road and connected at both ends by public sidewalks because the walkway provides an essential public function, such that excluding persons from it based on their expressions would violate the First Amendment of the United States Constitution.

#### ***I. ERISA.***

Bins v. Exxon Co., USA, 189 F.3d 929 (9<sup>th</sup> Cir. 1999). A retired employee brought action under the Employee Retirement Income Security Act (ERISA) alleging that his former employer violated its fiduciary duty by failing to inform him prior to his retirement that it was considering offering a lump-sum retirement incentive under an existing severance plan. The court held that once an employer seriously considers a proposal to offer a changed severance benefit under an existing ERISA plan, it has an affirmative duty to disclose information about proposed changes to participants and beneficiaries whom it knows or should know are considering retirement and to whom the information would be useful.

### **III. SUPREME COURT OF NEVADA.**

#### ***A. Wrongful Discharge.***

Dillard's Dept. Stores, Inc. v. Beckwith, 989 P.2d 882 (Nev. 1999). A \$3 million award to a Las Vegas Dillard's store employee who was ordered to return to work while still injured was unanimously upheld by the Nevada Supreme Court as it determined that the department store's constructive discharge of the employee violated Nevada public policy. The Court upheld a \$2.5 million judgment

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given by a jury to the employee, as well as \$518,000 in attorneys' fees. Beckwith suffered injuries while attempting to move a mahogany table on the job. The injuries she suffered rendered her unable to walk upright or without assistance. While two doctors recommended by Dillard's refused to clear her to work, company officials insisted she return. When she failed to return to work, she was replaced by another employee. After she did return to work, Beckwith was demoted and eventually given an entry-level sales position at a forty percent (40%) reduction in pay. In this position, she was humiliated by other employees, including teenage sales associates who laughed at her behind her back. The Court determined that by ignoring the priorities set forth in Nevada's Industrial Insurance Act for returning injured workers to employment, and demanding she return to work against doctor's orders, Dillard's violated "the public policy of this state [which] favors 'economic security for employees injured while in the course of their employment.'"

### ***B. Workers' Compensation.***

Advanced Countertop Design, Inc. v. Second Judicial Dist. Ct. of Nevada, 984 P.2d 756 (Nev. 1999). The Court considered whether an employee's pursuit and acceptance of benefits under the State Industrial Insurance System (SIIS) precluded his ability to bring a suit of intentional tort against his employer. The employee was injured his first day on the job and submitted a workers' compensation claim which the SIIS accepted. Later, the SIIS granted the employee a permanent partial disability award and closed his claim. He later filed suit against his former employer for intentional tort. The Nevada Supreme Court first noted that it is well established that compensation from SIIS is the sole remedy an injured employee has against his employer when the injury results from an accident arising out of and in the scope of his employment. The Court chose to extend the exclusive remedy to intentional torts as well because Nevada courts have consistently held that an injured employee's acceptance of a final SIIS award acts as an accord and satisfaction of common law rights, thereby extinguishing any common law right the employee might have had against his employer. The employee could not claim that he was unaware that he was waiving his common law rights by accepting the SIIS award. An injured employee making a statutory workers' compensation claim is charged with knowledge of the statute's provisions.

### ***C. Charging Non-Union Members for Representation.***

Cone v. Nevada Service Employees Union, 116 Nev. Adv. Op. No. 54 (May 4, 2000). In Cone, the Court decided a case of first impression under the Local Government Employee-Management Relations Act. Specifically, three employees of the University Medical Center of Southern Nevada ("UMC") challenged a policy of the Nevada Service Employees Union/SEIU Local 1107 to charge nonunion members, within its bargaining unit, fees for representation in grievances, hearings, and arbitrations, or in the alternative allow nonunion members to hire their own counsel. The Court held that there is no discrimination or coercion in requiring nonunion members to pay reasonable costs associated with individual grievance representation, and therefore, found the policy to be legal under Nevada's labor and right-to-work laws.

### ***D. Nevada Uniform Trade Secrets Act.***

Frantz v. Johnson, 116 Nev. Adv. Op. No. 53 (May 4, 2000). Johnson Business Machines ("JBM"), a provider of plastic cards used by casinos as VIP and slot machine player tracking cards, sued Michelle Frantz, its former sales manager, and several other competitors for whom Frantz worked after she began to solicit and obtain business from JBM's customers. Besides seeking and obtaining equitable relief, JBM sued for misappropriation of confidential information, breach of fiduciary duty, interference with prospective economic advantage, fraud, misrepresentation, unjust enrichment, and civil conspiracy. The Court found in favor of JBM and awarded it damages for lost profits, punitive damages, attorney fees, expenses and costs, which added up to over \$500,000. On appeal, the Nevada Supreme Court found that the lower court failed to apply the Uniform Trade Secrets Act ("USTA"), which "displaces" other tort and restitutionary civil causes of action for the statutory cause of action for misappropriation of a trade secret. However, the Court found that the lower court's failure to apply the USTA was harmless as JBM pleaded and offered sufficient evidence at trial to establish a USTA violation. The Court remanded the case to the lower court to recalculate compensatory and punitive damages for other reasons. This case illustrates the importance of carefully examining the provisions of the USTA when litigating business torts that could be related to the misappropriation of trade secrets, as it precludes many other types of common law remedies. JBM was extremely lucky that its

pleadings and evidence were sufficient to establish the elements of a USTA cause of action.

#### **IV. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION.**

##### ***A. Harassment Under Title VII and Other Laws.***

The EEOC made two significant changes to its enforcement guidelines in order to comply with the Supreme Court's 1998 decisions in Burlington Industry Inc. v. Ellerth, 524 U.S. 742, 118 S. Ct. 2257 (1998) and Faragher v. City of Boca Raton, 524 U.S. 775, 118 S. Ct. 2275 (1998), both of which dealt with an employer's liability for sexual harassment instigated by a supervisor. First, on October 29, 1999, the Commission rescinded portions of its June 21, 1999 guidelines on sex and national origin discrimination that conflicted with the two decisions. Secondly, on June 18, 1999, the Commission issued *Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors*. Although the Supreme Court rulings dealt with sexual harassment, subsequent decisions have broadened their application, and the EEOC's guideline reflects interpretation that extends the liability standards to race, national origin, age, disability, and harassment "based on opposition to discrimination or participation in complaint proceedings." The guidance also covers "non-sexual" sex harassment, which the EEOC defines as harassment that targets an individual because of his or her sex, even if it does not involve sexual comments or conduct. The Supreme Court held that employers are always responsible for harassment when it culminates in a tangible employment action. In the guidance, the EEOC reasons that such an action generally "inflicts direct economic harm" and is caused by a supervisor or someone else exercising company authority. The Commission also set forth criteria for an effective anti-harassment procedure which would enable an employer to establish an affirmative defense should the harassment not result in a tangible employment action. According to the EEOC, an effective anti-harassment policy and complaint procedure should contain the following elements:

- (1) a clear explanation of prohibited conduct;
- (2) assurance that employees who make complaints or provide information related to such complaints will be protected against retaliation;
- (3) a clearly-described complaint process that provides accessible avenues of complaint;

- (4) assurance that the employer will protect the confidentiality of harassment complaints to the extent possible;
- (5) a complaint process that provides a prompt, thorough, and impartial investigation; and
- (6) assurance that the employer will take immediate and appropriate corrective action when it determines that harassment has occurred.

The guidance also provides detailed information on each element and suggests specific questions employers can ask during complaint investigations.

##### ***B. Reasonable Accommodation Under the Americans With Disabilities Act.***

On March 1, 1999, the Commission issued *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans With Disabilities Act*, which stated the EEOC's interpretation on several issues surrounding the accommodation process. First, in regard to a disabled employee's request for an accommodation, the Commission believes that the request itself needs to include two elements: (1) There must be some indication that a medical condition is involved; and (2) there must be a request for some sort of change in the work situation. For example, "I have a back problem and I need six weeks off" is an acceptable request. Though in the vast majority of cases it is the employee which needs to make the request, the EEOC guidance states the employer should initiate the reasonable accommodation interactive process without being asked if the employer:

- (1) knows the employee has a disability;
- (2) knows or has reason to know that the employee is experiencing workplace problems because of the disability; or
- (3) knows or has reason to know that the disability prevents the employee from requesting a reasonable accommodation.

In some instances, according to the guidance, it may be appropriate for a family member, doctor, or other third party to request an accommodation for a disabled employee.

Second, the guidance alludes to the appropriate conduct necessary for an interactive reasonable accommodation process. In short, an employer must at least "do something." When an employee requests a reasonable accommodation, the employer must meet with the

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employee, listen to the request, and explore the accommodation options. Simply ignoring the request could subject the employer to liability. An employer can ask for reasonable documentation to establish that the employee has an ADA disability and that the disability necessitates a reasonable accommodation. The guidance also dictates that if an employee provides insufficient information from the treating physician, the employer can require the employee to undergo evaluation by a health professional of the employer's choice. If one party is responsible for a breakdown of the interactive process, then the courts should rule against that party.

Finally, the guidance examines the issue of what might constitute a reasonable accommodation under certain circumstances. Interesting to note are two specific accommodations which do not place an undue burden on the employer. First, an employer cannot deny a request for leave solely because the employee cannot provide a fixed day of return. Conversely, in such situations, an employee should keep the employer informed of his progress. Secondly, in cases where reassignment is requested, such reassignment cannot be considered an undue burden simply because it would conflict with seniority provisions of a collective bargaining agreement. According to the guidance, the employer and the union should be able to work out a variance to the contract.

### ***C. Undocumented Workers.***

Reversing its previous policy, the EEOC issued *Enforcement Guidance on Remedies Available to Undocumented Workers Under Federal Employment Discrimination Laws* on October 26, 1999. Under the new guidelines the Commission concludes that unauthorized workers who are subject to unlawful employment discrimination are entitled to the same relief as other victims of discrimination. The remedies include injunctive relief to prevent future discrimination, reinstatement, and damages.

## **V. NATIONAL LABOR RELATIONS BOARD.**

### ***A. Unit Clarification.***

John P. Scripps Newspaper Co. and Comm. Workers of Am., Local 14671, 329 N.L.R.B. No. 74 (Sept. 30, 1999). In holding that creative services department employees working for *The Sun* newspaper should be added to an existing bargaining unit of composing room employees, the Board formulated a new standard for unit clarification proceedings involving units defined by the work performed.

Generally, in determining whether a new group of employees should be added to an existing bargaining unit, the Board normally considers such factors as compensation, work hours, supervision, qualifications, skills, training, job functions, location, work contact, integration, interchange, bargaining history, and the new employees' role in relation to the existing unit's operations. In the instant case, the Board determined that when the scope of a unit is defined by the work it performs, then the work performed will be central to the Board's analysis. As such, the 3-2 Board majority adopted a standard, in dealing with work-defined units, which presumes that new employees should be added to the unit if the new employees' job functions are similar to those performed by unit employees, unless the unit functions are an insignificant part of the new employees' work. The party seeking to exclude the employees has the burden to rebut the presumption and show that the new group is sufficiently dissimilar from the unit employees.

### ***B. Union Photographing.***

Randell Warehouse of Arizona, Inc., 328 N.L.R.B. No. 153 (July 27, 1999). In this case, the Board determined that a union was entitled to photograph its representatives distributing union literature to workers outside an employer's plant before a representation election. Previously, under Pepsi-Cola Bottling Co., 289 N.L.R.B. 736 (1988), the Board held that union photographing or videotaping of employees engaged in protected activities during an election campaign, without further justification, necessarily interfered with employee free choice. In the instant case, the Board decided that the Pepsi standard is inconsistent with NLRB law involving union inquiry into employees' sentiments respecting representation. The general prohibition of making a visual record of employees' reaction to proffered union literature could not be reconciled with Board and court cases permitting unions, among other things, to ask employees directly whether they support the union and to record employee responses. In the Board's opinion, there is no objective basis for distinguishing between recording an employee's response in documentary form, on the one hand, and making a visual record through videotaping or photographing on the other. Employer photographing or videotaping employees engaged in protected activities still remains unlawful, however, because it has a tendency to intimidate employees.

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### ***C. Right To Resign From a Union.***

Polymark Corp., 329 N.L.R.B. No. 7 (Sept. 1, 1999). In this case, the Board rendered a somewhat surprising decision broadening an employee's right to resign from union representation. In a collective bargaining agreement entered into by Polymark and the union, workers were required to become members of the union and to remain in good standing. The agreement further provided for an automatic dues check-off. Previously, the Supreme Court had generally held that workers cannot be required to maintain formal membership in the union. However, the employee may still be charged a service fee limited to the costs incurred by the union in representation. In Polymark, the Board held that an employee can resign from a union at any time as long as the revocation of his dues checkoff authorization conforms with established procedures. Making the decision all the more surprising, the Board determined that the union violated its duty of fair representation by not responding quickly enough to the employee's request that his withholding be reduced. The union's policy of imposing a one-month annual window period for workers to object to the deduction of full dues is coercive and interferes with their right to resign from the union.

### ***D. Gissel Remedial Bargaining Orders.***

On November 10, 1999, NLRB General Counsel Fred Feinstein issued a guideline memorandum discussing the factors agency personnel should apply in determining whether to seek remedial bargaining orders. In NLRB v. Gissel Packing Co., 395 U.S. 575, 89 S. Ct. 1918 (1969), the U.S. Supreme Court held that the NLRB has the authority to issue a remedial bargaining order based only on union authorization cards signed by a majority of employees if the employer committed serious unfair labor practices that make it extremely difficult to hold a fair election. Under the Court's decision, such an order may be warranted in two types of cases. Category I cases involve such outrageous and pervasive unfair labor practices that the coercive effects cannot be eliminated by traditional remedies, and the holding of a fair and reliable election is impossible. Category II involves less pervasive practices which still have a tendency to undermine and impede the election process. The memorandum identifies the following factors to be considered by Board agents when seeking a remedial bargaining order in Category II cases:

- (1) the presence of "hallmark" violations that the Board and the courts consider to be highly coercive of employee rights;
- (2) the number of employees affected by the violation, either directly or indirectly through discussion among employees;
- (3) the size of the bargaining unit;
- (4) the identity of the perpetrators of the unfair labor practices, such as a low-level supervisor or the company president;
- (5) the timing of the unfair labor practices in relation to union activity or a representation election;
- (6) direct evidence of the violations' impact on majority support for the union, such as a discrepancy between the number of employees who signed authorization cards and those who ultimately voted for the union;
- (7) the likelihood that violations will reoccur; and
- (8) changes in circumstances after the violations that might obviate the need for a bargaining order.

### ***E. Challenging Union's Representation Authority.***

St. Elizabeth Manor, Inc., 329 N.L.R.B. No. 36 (September 30, 1999). In this case, the union and the preceding owner of St. Elizabeth Manor entered into a three-year collective bargaining agreement. Shortly thereafter, St. Elizabeth was purchased, and the new owner voluntarily recognized the union as the representative of the employees whom the new owner retained after purchase of the business. After subsequent bargaining was halted, the new owner filed a petition with the Board, challenging the union's majority-based authority to represent the bargaining unit. Under a previous decision, the Board held that a successor-employer was not barred from challenging the union's authority even though it had already voluntarily recognized the union. Instead, the union was only entitled to a rebuttable presumption that it had the continuing support of a majority of unit employees. The Board overturned this precedent in the instant case by adopting the "successor-bar" rule. Under this rule, once a successor-employer becomes obliged to recognize an incumbent union by retaining a majority of the predecessor's employees, the union is entitled to a reasonable period of time for bargaining without any challenges to its majority status.

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### ***F. Intersection of the NLRA and ADA.***

Lockheed Martin Astronautics, 330 N.L.R.B. No. 66 (Jan. 6, 2000). In this case, a female guard at a Lockheed facility informed her fellow guards that medical restrictions prevented her from wearing a sidearm and from handling classified trash. The other guards immediately began discussing their concerns that the woman would not be able to be of assistance if they should need her in an emergency situation, given her inability to carry a sidearm. Likewise, they were concerned that the woman was violating the collective bargaining agreement by not performing classified trash work, and that she might be depriving other guards of overtime opportunities by working at posts for which other guards were more qualified. Upon learning of these discussions, the woman filed a complaint with the employer, contending that she was being subjected to a hostile work environment. A supervisor warned three guards to cease any discussion involving the woman's accommodations, even if they were planning on filing a grievance with the union. Two guards were later suspended for continuing to discuss the woman and her medical accommodations. In finding that the employer violated the employees' Section 7 rights under the National Labor Relations Act, the Board dismissed the employer's argument that it was obligated to put an end to such conversations under the Americans with Disabilities Act. The Board noted that while an employer may have obligations under other statutes, including the ADA, which may justify the prohibition of certain kinds of speech, any such prohibition must be narrowly tailored in order to avoid unnecessarily depriving employees of their rights to discuss working conditions which may affect them. Here, the Board asserted, the employer prohibited all discussion of the woman's medical restrictions, even though those restrictions might have adversely affected other employees' working conditions.

### ***G. Handbooks and Personnel Manuals.***

In a recent trend, accentuated most recently in Lafayette Park Hotel, 326 N.L.R.B. No. 69 (Aug. 7, 1998), the NLRB has shown an increasing willingness to scrutinize the legality of seemingly innocuous language found in employee handbooks and personnel manuals. In Lafayette Park, the Board found three provisions of an employee handbook to violate Section 8(a)(1) of the National Labor Relations Act, which prohibits employers from infringing on an employee's right to engage in concerted activity guaranteed

by Section 7. As a standard, the Board stated that it would inquire as to whether a given rule would reasonably tend to chill employees in the exercise of their Section 7 rights. Where the rules are likely to have a chilling effect, the Board may conclude that their maintenance is an unfair labor practice, even absent evidence of enforcement. The first rule at issue stated that unacceptable employee conduct included, "Making false, vicious, profane or malicious statements toward or concerning the [hotel] or any of its employees." The Board ruled that this rule was unlawful as it punished employees for conduct which was not clearly defined, and as such, it caused employees to refrain from engaging in protected activities. Yet, the Board indicated that a rule prohibiting an employee from making "maliciously false" statements, as opposed to "false" statements would be accepted. The second rule at issue required employees to leave the premises immediately after completion of their shift. The Board held that this rule was unlawfully broad because it effectively denied off-duty employees access to the parking lot and other nonworking areas to conduct activity consistent with Section 7.

Still, some handbook provisions appear safe from Board scrutiny. In K-Mart, d/b/a Super K-Mart, 330 N.L.R.B. No. 29 (Nov. 30, 1999), the Board specifically upheld the legality of a company confidentiality policy which stated, "Company business documents are confidential. Disclosure of such information is prohibited." In overturning an administrative law judge's decision, the Board reasoned that the provision did not by its terms prohibit employees from discussing wages or working conditions. In its opinion, "employees reasonably would understand from the language of Respondent's confidentiality provision that it is designed to protect legitimate interests in maintaining confidentiality of private business information, not to prohibit discussion of wages or working conditions."

In general, NLRB Regional Offices have utilized the Lafayette Park ruling as authorization to actively attack employee handbooks, and complaints have been issued over employer rules that deal with alternative dispute resolution, internal problem resolution procedures, and both on- and off-duty misconduct. Employers are advised the carefully review their current policies and work rules to ensure that they could not be construed as having a "chilling effect" on an employee's exercise of rights guaranteed by Section 7 of the NLRA.

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## ***H. Wall-to-Wall Units.***

Overturning precedent favoring wall-to-wall bargaining units in the utilities industry, the NLRB, in a 3-2 decision, approved a petitioned-for unit of a small regional telephone company's customer service technicians and a maintenance employee, excluding its customer service representatives, an assistant-data processing employee, and a cashier. See Deposit Telephone Co., 328 N.L.R.B. No. 151 (July 27, 1999).

Previously, under both Red Hook Telephone Co., 168 N.L.R.B. 260 (Nov. 16, 1967) and Fidelity Telephone Co., 221 N.L.R.B. 1335 (Jan. 2, 1976), the Board had placed emphasis on the size of the employee contingent and the geographic service area in determining the appropriateness of a less than system-wide unit. In Deposit Telephone, the Board stated that size is only a minor factor to be considered when applying the more traditional community of interest test. Size and geographic area are not to be controlling factors in and of themselves. While this decision was specific to the utilities industry only, it is likely to have an effect on other industries in which the Board has generally favored system-wide bargaining units.

## **VI. LEGISLATION.**

### ***A. Nevada Legislation.***

#### **1. Sexual Orientation Discrimination.**

Under an amendment to the Fair Employment Practices Act (NRS § 613.330), employers are now prohibited from discriminating against persons because of their sexual orientation. The prohibitions also apply to labor organizations and apprenticeship programs. The amendment creates a cause of action under state law which is otherwise not yet available under federal employment statutes.

#### **2. Genetic Testing.**

As of October 1, 1999, it is unlawful for any employer to require or encourage prospective or current employees to submit to any form of genetic test. Likewise, an employer cannot alter the terms and conditions of an individual's employment based solely genetic information an employer might otherwise receive. See NRS § 613.345.

#### **3. Workers' Compensation.**

The 1999 legislative session led to several changes in the workers' compensation scheme here in Nevada. Most significant were changes which dealt with "temporary

modified duty." Since 1993, an employer was encouraged to bring an injured employee back to work as soon as a physician released the employee to work with temporary restrictions. In return, employers were allowed to pay injured workers eighty percent (80%) of their average monthly wage as part of temporary modified duty programs. Effective January 1, 2000, however, the incentive for employers to provide temporary modified duty is no longer in effect. Instead, employers that assign workers to temporary modified or "light" duty must pay the same wage paid at the time of the injury if the worker is returned to work in the same classification, or substantially the same wage if returned to a different job.

### ***B. Federal Legislation and Regulations.***

#### **1. Ticket to Work and Work Incentives Improvement Act.**

Signed by President Clinton on December 7, 1999, this Act is designed to allow disabled workers who return to work to keep their Medicare or Medicaid coverage, as well as provide them with access to rehabilitation and training services. Key features of the legislation are a state plan option to allow Medicaid programs to extend coverage to workers with disabilities and the creation of a \$250 million demonstration program to allow people with potentially disabling diseases or conditions, such as HIV, to receive health care coverage. The Act also extends Medicare coverage for an additional 4.5 years, for a total of 8.5 years, for Social Security Disability Insurance beneficiaries who go to work.

#### **2. Stock Options and the Fair Labor Standards Act.**

In an opinion letter issued on February 12, 1999, the Department of Labor stated that the value of an employee's stock options should be factored into their regular pay rate in determining overtime pay under the Fair Labor Standards Act (FLSA). According to the Department of Labor, to include stock option profits in an employee's regular rate of pay, the profit must be allocated over the period of time in which it was earned, ending with the workweek in which the option was exercised and going back to the date of the employee's right to purchase the shares. However, the profit may not be allocated over more than the previous two years due to the statute of limitations set by the Portal-to-Portal Act. It should be noted that DOL opinion letters are not necessarily binding, are usually responses to a specific request for assistance, and are based exclusively on the facts

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presented in that request. Nonetheless, the opinion letter has raised the ire of numerous employers who claim that it could ruin a valuable compensation and incentive tool. It is too soon to tell how the DOL will continue to enforce on this matter.

### **3. Proposed Ergonomic Standards.**

After almost a decade of Congressionally imposed delay, the Occupational Safety and Health Administration issued a proposed ergonomics program on November 23, 1999. See Proposed Ergonomics Program, 64 Fed. Reg. 65,768-66,078 (1999) (to be codified at 29 C.F.R. pt. 1910). If accepted, the new standards apply to any business that employs persons in manufacturing jobs, manual handling jobs, or any business that has reports of employees suffering from musculoskeletal disorders (MSDs). The standards only cover those recordable MSDs that also meet these screening criteria:

- (e) The physical work activities and conditions in the job are reasonably likely to cause or contribute to the type of MSD reported; and
- (f) These activities and conditions are a core element of the job and/or constitute a significant amount of the employee's worktime

Further, the standards are only job-based, do not have to be instituted throughout an entire workplace, and do not apply to agriculture, construction, or maritime operations.

In general, affected employers must institute an ergonomics program which includes six program elements: 1) management leadership and employee participation in development of the program; 2) methods of conveying hazard information and reporting of hazards; 3) job hazard analysis and control; 4) training; 5) MSD "management" or prevention; and 6) program evaluation. Employers with ten or more employees must comply with record-keeping requirements in which employee reports of MSDs, job hazard analyses, hazard control records, program evaluations and management records are kept on file for three years.

There is no indication as to when the final ergonomic standards will be issued. In general, OSHA has recently come into conflict with the Republican-led Congress over many of its proposed regulations. For example, at the end of 1999, DOL was forced to rescind an opinion letter of the Occupational Safety and Health Administration which stated that employers could be liable for the condition of employees' home offices. Since then OSHA has issued a directive exempting home offices from job safety inspections. The ergonomics standards have come under similar fire, and most Republicans would like the standards to be delayed until the National Academy of Sciences issues a study on ergonomics in 2001. Reflecting this, OSHA has already extended the deadlines for public comment, and hearings on the subject are likely to be long and heated.