

# BB REVIEW

## The Employment Law Update

### U.S. Supreme Court Update

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Each year the United States Supreme Court is called upon to clarify the meaning of various employment laws. This term, the Court's decisions affect every stage of the litigation process. The Court addressed issues of (1) verification of the EEOC charge, (2) the contents of the complaint to be filed with a court, (3) dismissal of the lawsuit because of an arbitration agreement, (4) immunity, and (5) damages. The Court also clarified the definition of "disability" under the Americans with Disabilities Act and invalidated a Department of Labor Regulation interpreting the Family and Medical Leave Act. Some of the decisions are summarized below.

#### Update Verifying EEOC Charges

*Edelman v. Lynchburg College*, 122 U.S. 1145 (2002). Shortly after Leonard Edelman was denied tenure, he wrote a letter to the EEOC alleging that the decision was based on his race and sex. The letter was signed by Edelman but was not executed under oath or affirmation. It was not until months later – after the statutory deadline for filing a charge – that Edelman filed a verified charge of discrimination. Lynchburg College sought to dismiss his lawsuit on the basis that the claims were barred for failure to file the charge within the appropriate period of time. Relying on EEOC regulations, Edelman argued that his charge related back to unverified correspondence.<sup>1</sup>

<sup>1</sup> 29 CFR 1601.12(b) provides in relevant part that "a charge is sufficient when the Commission receives

Title VII requires that a charge be in writing under oath or affirmation (42 U.S.C. § 2000e-5) and that the charge must be verified. The Court held that the charge related back and was therefore timely. In so doing, the court noted that the verification requirement was designed to protect "employers from the disruption and expense of responding to a claim unless a complaint is serious enough and sure enough to support it by oath subject to liability for perjury. This object, however, demands an oath only by the time the employer is obliged to respond to the charge, not at the time an employee files it with the EEOC."

#### Arbitration

*Equal Employment Opportunity Commission v. Waffle House*, 122 S.Ct. 754 (2002). Waffle House required its employees to sign an agreement requiring employment disputes to be settled by binding arbitration. Baker filed a charge of discrimination alleging that his termination violated the ADA. The EEOC filed suit on behalf of Baker. Waffle House sought to compel arbitration. The Court held that in spite of the arbitration agreement, the EEOC could maintain the action on Baker's behalf. Recognizing the

from the person making the charge a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of. A charge may be amended to cure technical defects or omissions, including failure to verify the charge, or to clarify and amplify allegations made therein. Such amendments and amendments alleging additional acts which constitute unlawful employment practices related to or growing out of the subject matter of the original charge will relate back to the date the charge was first received."



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authority of the EEOC to bring actions on behalf of aggrieved employees, the Court held that an agreement between an employer and an employee to arbitrate employment-related disputes does not bar the EEOC from pursuing victim-specific relief, such as backpay, reinstatement, and damages. This case did not invalidate arbitration agreements, but rather recognized the unique status of the EEOC.

### State Immunity

*Board of Trustees of the University of Alabama v. Garrett*, 121 S.Ct. 955 (2001). The Eleventh Amendment of the United States Constitution bars application of Title I of the Americans with Disabilities Act to states and their instrumentalities. Because municipalities do not have immunity under the Eleventh Amendment, ADA claims may be brought against municipalities. Consequently, a state agency may not be sued for disability discrimination unless it waives its sovereign immunity.

### Seniority System and Reasonable Accommodation

*US Airways, Inc. v. Robert Barnett*, 535 U.S. \_\_\_ (2002). This case addresses whether a disabled worker's interest in being assigned to another position as a "reasonable accommodation" trumps the interests of other workers with superior rights to bid for the vacant job under an employer's seniority system. The Supreme Court held that "ordinarily" the answer is no, and an assignment that would violate the rules of an employer's seniority system will normally not be a "reasonable" accommodation. However, the Supreme Court stated that a plaintiff 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. The Supreme Court gave a list of non-exclusive examples where such special circumstances may exist, such as where the employer unilaterally exercises its right to change or modify the seniority system frequently reducing employee expectations that the system will be followed, or where the seniority system already contains exceptions such that one further exception is unlikely

to matter. Nonetheless, the plaintiff will bear the burden to prove the existence of special circumstances that make an exception from the seniority system reasonable in the particular case.

### Definition of Disabled

*Toyota Motor Manufacturing v. Williams*, 534 U.S. 184 (2002). Williams claimed to be disabled because of carpal tunnel syndrome and other related impairments. She had permanent work restrictions that precluded her from lifting more than 20 pounds, from frequently lifting or carrying objects weighing up to 10 pounds, engaging in constant repetitive flexion or extension of wrists or elbows, performing overhead work, or using vibratory or pneumatic tools. For two years, Toyota assigned Williams to various modified-duty jobs. Williams filed a state law claim for workers' compensation, which was settled. She also filed an ADA claim alleging failure to accommodate which was settled. When Williams subsequently returned to work she was placed in a quality control position. Initially she was required to perform only two of four tasks. When Toyota decided that all employees in her position must perform all four tasks, Williams complained of pain and requested that she be accommodated by being allowed to perform only two of the tasks. When this request was denied, Williams submitted a medical statement placing her under a no-work-of-any-kind restriction. Shortly thereafter, Williams was terminated for poor attendance. Williams then sued Toyota claiming it violated the ADA by failing to accommodate her disability and terminating her.

The court rejected Williams' claim that she was disabled as defined by the Americans with Disabilities Act. The Court noted that Williams was able to tend to her personal hygiene and carry out personal or household chores. The court found Williams' claim to be substantially limited in performing manual tasks inconsistent with her repeated request to perform only certain manual tasks. In reaching its decision, the Court explained the proper manner in which to assess whether an employee is disabled. The Court held that "Merely having an



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impairment does not make one disabled for purposes of the ADA. Claimants also need to demonstrate that the impairment limits a major life activity. . . To qualify as disabled, a claimant must further show that the limitation on the major life activity is substantial." The Court went on to establish the following test to determine whether an employee is substantially limited with respect to the performance of manual tasks. "[T]o be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives. The impairment's impact must also be permanent or long term." Noting that symptoms of impairments can vary widely from person to person, the Court reiterated that an employee must submit an individualized assessment of the impairment as to that employee.

### **Retaliation**

*Clark County School District v. Breeden*, 121 S.Ct. 1508 (2001). Breeden was one of three people who reviewed employment applications. An application contained material which could have been considered offensive. When one of the other reviewers commented that they did not know what the comment meant, the third reviewer stated "Well, maybe I better tell you later." Breeden complained about the incident to several members of management. She later sued, alleging she had subjected to retaliation for complaining about the incident. The Court held that in order to be protected against retaliation, a protestor must have had a reasonable belief that the conduct violated Title VII. Because no reasonable person could find that the alleged conduct Breeden objected to constituted sexual harassment, there was no legitimate claim of retaliation.

### **Damages – Front Pay**

*Pollard v. E.I. duPont*, 121 S.Ct. 1946 (2001). In this case, the Court held that front pay is outside the damage caps under Title VII. Thus, a Title VII plaintiff who claims sex, religious, national origin discrimination or retaliation can recover not

only compensatory and punitive damages up to the statutory limit, as well as attorney fees, but also substantial front pay.

### **FMLA**

*Ragsdale v. Wolverine World Wide, Inc.*, 122 S.Ct. 1155 (2002). Ragsdale was diagnosed with Hodgkin's disease. Under Wolverine's leave plan, she was eligible for seven months of unpaid leave. She missed 30 consecutive weeks of work. Wolverine held her position during this period of time and maintained her health benefits. Wolverine terminated Ragsdale when she did not return to work following the 30-week leave. Ragsdale claimed that because the company did not notify her that the leave was considered FMLA leave, she was entitled to an additional 12 weeks leave. Ragsdale relied on Labor Department Regulation 29 CFR 825.700(1) which provides that: "If an employee takes paid or unpaid leave and the employer does not designate the leave as FMLA leave, the leave taken does not count against an employee's FMLA entitlement." The Court held this regulation invalid "because it alters the FMLA's cause of action in a fundamental way: it relieves employees of the burden of proving any real impairment of their rights and resulting prejudice." The Court further noted that the regulation's penalty was disproportionate and inconsistent with Congressional intent. The statute requires employers to post a notice of employee's rights under the FMLA and provides a civil monetary penalty not to exceed \$100 for willful violation of the notice requirement.

### **NLRB Backpay for Illegal Immigrants**

*Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*, 122 S.Ct. 1275 (2002). Relying on falsified documents appearing to verify authorization to work in the United States, Hoffman hired Castro. Castro was terminated after he supported a union-organizing campaign. The NLRB ordered Hoffman to reinstate Castro with backpay. During a proceeding in front of an Administrative Law Judge to determine the amount of backpay, Castro testified that he was born in Mexico and had never been



**Balch & Bingham Hires  
New Attorneys:**

R. Pepper Crutcher, Jr.

Armin J. Moeller, Jr.

David M. Thomas, II

E. Russell "Rusty" Turner

legally admitted to, or authorized to work in, the United States. The Court held that federal immigration policy, as expressed by Congress in the Immigration Reform and Control Act of 1986

precluded an award of backpay to an undocumented alien who had never been legally authorized to work in the United States.

# Veteran Labor Attorneys Join Balch & Bingham

On May 13, 2002, R. Pepper Crutcher, Jr., Armin J. Moeller, Jr. and David M. Thomas, II joined the firm as partners and Rusty Turner joined the firm as an associate in the Labor and Employment Law Section in the Jackson, Mississippi office. Highlights of their careers include:

## **R. Pepper Crutcher, Jr.** **Practice**

Mr. Crutcher provides employer consultation and advocacy concerning disputes and transactions with present and former employees, labor unions, regulatory agencies, and competitors.

## **Professional Background**

- Admitted to practice in Louisiana (1982) and Mississippi (1986)
- Chairman, Mississippi Bar Section of Labor and Employment Law (1996-97)
- Editor, *The Mississippi Lawyer* (1990-91 and 1996-97)
- Executive Committee, Labor & Employment Law Practice Group, Federalist Society for Law & Public Policy Studies (1997-)

## **Representative Work**

- Union and non-union arbitration of wrongful discharge claims, and suits to compel arbitration
- Litigation of retaliation and whistleblower claims under Title VII, Mississippi law, and the federal False Claims Act

- Litigation to enjoin strike violence and to recover damages caused by striker misconduct
- Coordination of employee theft investigations by employers and retained investigators
- Litigation of employment compensation disputes arising from information technology design/build projects
- Litigation to remedy unfair competition by former employees
- Litigation defending new employers' hiring of employees allegedly restrained by agreement limiting competition with former employers
- Investigation and trial on NLRB unfair labor practice charges
- Coordination of employer responses to union organizing campaigns
- Litigation of Title VII, ADEA and EPA claims
- Litigation of multi-defendant sex harassment claims

## **Armin J. Moeller, Jr.** **Practice**

Practice includes labor relations employment law; litigation; drafting and negotiating contracts including drafting and negotiating information technology project agreements; and litigating claims against information technology companies.



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### **Professional Background**

- Admitted to practice in Louisiana and Mississippi
- Trial Attorney with the National Labor Relations Board 1972-75
- Adjunct Professor of Law, Mississippi College School of Law, where he taught courses in labor relations, employment law, administrative law and the federal courts, 1976-1985
- In each edition of *The Best Lawyers in America* since 1988
- Chair of the Labor and Employment Law Section, The Mississippi Bar, 1987-88
- President, Mississippi Defense Lawyers Association, 1988-89

### **Representative Work**

#### **Labor and Employment**

- Received a \$25,000 attorneys fees award for the prevailing employer against a former employee
- Defeated workers' compensation and race discrimination claims concerning an employee's hanging on basis it was the result of his own prank
- Removed an engineering/manufacturing facility from UAW master auto agreement and negotiated a 60% reduction in wage rates
- Compelled 6 female employees to arbitrate multi-million dollar claims about installation of one-way mirror in their restroom: claimants awarded only \$500
- Compelled arbitration of four employees' claims of sex discrimination, hostile work environment and retaliation against Fortune 100 company; prevailed on all claims
- Arbitrator found just cause for discharge of long term employee accused of sexual harassment although the company's evidence circumstantial

### **Contracts and Information Technology Litigation**

- Lead counsel for the State of Mississippi in filing suit for compensatory and punitive damages for failed technology project; jury awarded \$474,534,692; successfully settled case for \$185,000,000
- Negotiated healthcare claims administrative services contract covering over 80,000 public employees

### **David M. Thomas, II** **Practice**

Practice includes representation of employers in all areas of employer/employee relations including hiring, training, compensation, harassment, discipline, discharge and contractual relationships. Mr. Thomas represents management interests before the EEOC, NLRB, Wage and Hour Division of the Department of Labor, other state and federal agencies and in all phases of federal and state court litigation.

### **Professional Background**

- Admitted to practice in Mississippi (1988)
- Past Chair of the Mississippi Bar Section of Labor and Employment Law
- Past Chair of the Child Advocacy Committee and the Social Committee of the Hinds County Bar Association
- Contributing Editor to the *Developing Labor Law, Human Resources Management Reporter* and *The Mississippi Labor Letter*

### **Representative Work**

- Enjoyed picket line misconduct
- Successfully defended against reinstatement claims on the basis of striker misconduct
- Defeated unfair labor practice charges brought as part of union's "salting" campaign against employer



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- Successfully defended employers in federal court litigation involving claims of racial discrimination, age discrimination, sex discrimination and harassment, national origin discrimination, disability discrimination and retaliation
- Preparation of management policies covering pre-employment, employment and post employment procedures

- federal district court in Florida and Eleventh Circuit Court of Appeals
- Defeated claim of striker involved in picket line misconduct at unfair labor practice trial and on appeal before National Labor Relations Board
- Defeated claim of employee who alleged that company discharged her in retaliation for having asserted rights under the Family and Medical Leave Act (“FMLA”)

## **E. Russell “Rusty” Turner**

### **Practice**

Practice includes labor relations and employment law; maintaining non-union status, collective bargaining negotiations, work stoppages and arbitration; drafting of employment, severance, non-compete/confidential contracts, employee handbooks and substance abuse policies; state law tort claims including those for defamation, invasion of privacy and tortious interference with contracts; workers’ compensation claims.

### **Professional Background**

- Admitted to practice in Mississippi in 1994
- Executive Committee Member, Mississippi Bar Labor & Employment Section, since 2000
- Contributing Editor, *The Developing Labor Law* 1996-
- Frequent speaker and lecturer for Lorman Education Services and Council on Education in Management

### **Representative Work**

- Defeated claim of female employee allegedly raped by management employee in company bathroom
- Defeated age discrimination claim of management employee at district court level and after oral argument before Fifth Circuit Court of Appeals
- Successfully defended validity of auto manufacturer’s affirmative action program against claims of reverse discrimination before



