ROBINSON & COLE LLP
Labor, Employment & Benefits

U.S. Supreme Court Issues Two Rulings on Affirmative Action

The U.S. Supreme Court ruled on two cases involving affirmative action in higher education, reaching differing results. In Grutter v. Bollinger (6/23/03), the court ruled that the admissions policy used by the University of Michigan Law School is constitutional. The admissions policy directs admissions officials to assess applicants on a case-by-case basis, considering their personal statement, recommendations, essay, undergraduate record, and law school admission test scores. The policy expresses the law school's commitment to achieve a critical mass of minority students, including African American, Hispanic, and Native American students who otherwise may be underrepresented at the school. A white student challenged the policy after being denied admission to the law school. The Supreme Court found that the law school's policy does not violate the Equal Protection clause of the U.S. Constitution, Title VII, or Section 1981 because the policy is narrowly tailored to obtain educational benefits resulting from a diverse student body, a compelling state interest.

In contrast, in Gratz v. Bollinger (6/23/03), the court decided that the University of Michigan's undergraduate admissions policy is unconstitutional because it is not sufficiently narrow in its efforts to achieve classroom diversity. In contrast to the law school admission policy, the undergraduate policy includes a point system that gives an automatic 20 of 150 potential points to minority applicants. The court determined that the automatic 20 point bonus, without consideration of the particular background, experience, or qualities of each individual, does not require a sufficiently individualized assessment of an applicant. Therefore, the undergraduate admissions policy violated the Equal Protection clause, Title VII, and Section 1981.

Court Expresses Concern Whether Sick Policy that Requires Diagnosis Following Absences Violates ADA

The New York State Department of Correctional Services has a sick leave policy that requires an employee to provide a medical certification, including a brief general diagnosis, upon returning to work after an absence. The certification is usually not required for absences of less than four days. However, a supervisor may request the certification for shorter absences, for instance, when an employee has an attendance problem. A New York corrections officer, Belinda Fountain, and a group of similarly-situated Department employees, sued the Department alleging that the policy violated the Americans with Disabilities Act. The trial court found the Department liable because the policy could cause an employee to divulge a disability or perceived disability and, thus, constituted an impermissible "inquiry" under the ADA.

In Conroy v. New York State Department of Correctional Services (6/18/03), the U.S. Court of Appeals for the Second Circuit agreed that the policy falls within the ADA's general prohibition against inquiries regarding whether an employee has a disability or the nature or severity of the disability. The appeals court, however, sent the case back to the trial court to consider whether the policy falls under the "business necessity" exception to the ADA's general prohibition against inquiries.

Employee with Tourette's Not "Otherwise Qualified" to Work in Supermarket under ADA

When Kroger Supermarkets hired Charles Ray as a frozen foods clerk it was aware he suffered from Tourette's Syndrome, an illness that resulted in occasional outbursts of profanities, vulgar language, and racial slurs. When Ray experienced an outburst at work, he would show nearby customers an information card explaining Tourette's Syndrome. Several months into his employment, Ray directed a racial slur at a Kroger employee. Ray requested as an accommodation that he be transferred to the night shift, so that he would interact with fewer people and Kroger granted the request. Less than a year later, Ray blurted out a racial epithet in front of an African American contractor hired by Kroger. Kroger suspended and eventually terminated Ray. Ray sued Kroger under the Americans with Disabilities Act.

In Ray v. Kroger Company (5/27/03) the U.S. District Court in Georgia dismissed Ray's claims. The court acknowledged that Ray was disabled because of his inability to communicate with others over extended periods of time. However, the court found that he was not a "qualified individual" under the ADA because he could not perform his work without offending customers, other employees, or contractors. The court noted that, even if Ray was otherwise qualified to perform the job, Kroger had a legitimate basis for terminating him because a termination based upon an employee's misconduct does not violate the ADA, even if the misconduct is related to a disability.

Court Upholds $500,000 Verdict for Old Navy Manager Fired Because of Pregnancy

Gap Stores recruited Joanna Laxton away from her position as a manager at Wal-Mart to manage a new Old Navy store. After accepting the offer but before starting work, Laxton learned that she was pregnant. According to Laxton, when her boss learned of her pregnancy, she was unhappy that Laxton was due around Thanksgiving and, thus, unavailable during the busy holiday season. Afterward, her boss was usually unpleasant toward her.

In the first two months the store was open, Laxton received two written warnings for infractions of Gap policies, mostly minor. Following a third incident in which a supervisor reported additional violations, Laxton was fired and replaced with a male employee. She sued Gap for violating the Pregnancy Discrimination Act and a jury awarded her almost $500,000 in damages. However, the trial court set aside the verdict.

In Laxton v. Gap, Inc. (6/6/03) Laxton appealed to the U.S. Court of Appeals for the Fifth Circuit. The appeals court agreed with Laxton that the policy violations relied on by Gap for her termination were relatively trivial. In addition, the appeals court noted that only six weeks elapsed between Laxton's first warning and her termination, during which time her supervisors did not give her the opportunity to explain or improve her conduct. The appeals court decided that it was reasonable for the jury to conclude that Gap intentionally compiled a laundry list of minor violations to justify a predetermined decision to terminate Laxton based on her pregnancy and reinstated the verdict.

No Sex Stereotyping Harassment for Employee Perceived as Gay

Michael Hamm worked at Weyauwega Milk Products and had numerous performance problems. Co-workers speculated that Hamm and another male employee were romantically involved and rumors spread about the two men's relationship. In addition, in response to his errors, Hamm's co-workers called him names, including "fag--t," "bisexual," and "girl scout" and one of the men threatened to "snap his neck." Hamm filed several complaints, but the conduct continued. Weyauwega's interviews with Hamm's co-workers revealed that they were frustrated with his inability to complete work tasks correctly and with his instigation of problems and rumors at the plant. Eventually, the performance problems and name-calling escalated to the point that Hamm left the company. Hamm sued in federal court, alleging that he was sexually harassed and retaliated against for filing complaints in violation of Title VII. The trial court ruled in favor of Weyauwega prior to trial.

In Hamm v. Weyauwega Milk Products, Inc. (6/13/03) the U.S. Court of Appeals for the Seventh Circuit concluded that Hamm's claim of sexual harassment discrimination failed because the nature of the conflict between Hamm and his co-workers had to do with Hamm's continuing poor performance, not whether he fit his co-workers' sexual stereotypes for a man. The appeals court noted that, although male-on-male sexual harassment is protected by Title VII, harassment

based on an individual's sexual orientation is not. Hamm's only evidence to suggest sexual stereotyping, a co-worker calling him "girl scout," was not sufficient because the individual also used the term in reference to other employees and his supervisor.