

# LABOR & EMPLOYMENT LAW TODAY

The newsletter for the TBA  
Labor & Employment Section



## Letter from the Chair



**T**he Labor and Employment Section started 2005 with one goal: How to make the Section more relevant to its Members' practice. With that goal in mind, Executive Council Member and CLE chair, Mary Beard, has organized an exciting and new format to this year's section seminar. This year's seminar will offer members a unique opportunity to ask officials from the EEOC and selected corporate counsel the questions that keep you up at night. Dell Corporate Counsel, Ann Pruitt, will join fellow in-house counsel from FedEx and Tractor-Supply to share their insights on how to deal effectively with in-house attorneys on employment claims. EEOC Supervising Attorney, Faye Williams, and her colleagues will join the Section in a round-table discussion about what is important to the EEOC and Section members will have a unique opportunity to question each panel. Thanks to Mary for working very hard to create a seminar that will truly help both plaintiff and defense counsel improve the level and quality of their practice.

With this edition the Section renews publication of its newsletter. The creative thinking of Executive Council Member and Newsletter Editor, Stanley Graham, has developed a new approach. The Section's newsletter focuses on not just emerging issues but practice pointers to sharpen the skills of every practitioner. Thanks, Stan, for your leadership.

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Tennessee Bar  
Association

## The 9th Annual Labor and Employment Section Forum

Co-sponsored by the TBA Corporate Counsel Section

April 7 in Nashville • Tennessee Bar Center • (5 General, 1 Dual CLE Credits)

8:00-8:30 **Registration**

8:30-9:15 **New Developments in Labor Relations Law for the Unionized Employer and the Union-Avoidance Employer**

9:15-10:45 **Panel I: The Internal Strategies of the Equal Employment Opportunity Commission**

11-11:45 **Sarbanes-Oxley Act Issues and You**

11:45-1:15 **Lunch**

1:15-2:45 **Panel II: The Key Ingredients to a Perfect In-House/Outside Counsel Relationship and Defending Litigation**

2:45-3:30 **Emerging EEO Litigation**

3:45-4:45 **Ethical Issues for the Labor and Employment Attorney**

**RECEPTION:** Attendees and others are invited to a reception following the CLE at the Tennessee Bar Center

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## STATISTICALLY SPEAKING

# The use of statistics in individually brought disparate treatment litigation

By Elizabeth Wang, Ph.D., and Erik Geiger<sup>1</sup>

**Y**our company just terminated the employment of a group of employees, and most of them are over forty years old. Are you in danger of a lawsuit on the grounds of age discrimination? You are a woman and have been with a company for over five years and while you have remained at the same level, most of your male colleagues have been promoted, including those with less seniority. Are you a victim of discrimination based on gender?

In the corporate and legal world, some people are regarded as being part of certain “protected” classes. These classes include those based on race, sex, religion, national origin, age, and disability. With the advent of Title VII of the Civil Rights Act of 1964, companies across the country became under greater scrutiny for their employment policies and actions such as discriminatory treatment based on characteristics other than merit became prohibited by Federal and subsequent state laws. Since that time, more protected classes have been defined, and litigation based on employment practices has become a reality in corporate America. For instance, a consortium of female employees is currently suing Wal-Mart on the grounds of sexual discrimination.<sup>2</sup> United Parcel Service, Inc. is being sued over accusations of systemic violations of the Americans with Disabilities Act.<sup>3</sup> Abercrombie & Fitch has just settled a class-action lawsuit filed claiming they discriminated against minorities in the hiring process.<sup>4</sup> A basic question that needs to be addressed in these and other discrimination cases is whether a protected class has been treated less favourably than others not in the class, that is, has the protected class been a victim of “disparate treatment”? Being able to prove or disprove the existence of a discriminatory act and the existence of disparate treatment can be a complicated and technical process. Statistics can serve as an illustrative and important tool in determining the existence of disparate treatment in employment discrimination cases. We will discuss the effectiveness of statistics in seeking answers to the basic question in individually brought disparate treatment cases.

### I. A CLOSE LOOK AT THE BASIC QUESTION

How are statistics important to attorneys developing their cases for or against the possibility of the existence of a discriminatory act? The first question one must ask is precisely what impact is being compared in the case? For example, assume a group of Hispanic employees

(Population A) are alleging a disparity in pay from their non-Hispanic counterparts (Population B). Although this may seem to be a simple issue, it is important to fully understand the possible nuances involved with the issue. While the claim could be simply a disparity in base salary and bonus, it might also involve the entire earning and benefit package provided to employees comprised of a pension, health coverage, vacation time, etc.

The second important question to ask is who are we comparing? In discrimination cases, there may be one or many from a group who brings a complaint for being treated less favourably than others. In such a situation, it is crucial to identify a comparison with a similarly situated group belonging an unprotected class to which the plaintiff allegedly does not belong. The definition of “similarly situated” is often a key element in a discrimination case. In an ideal world, the comparison would be drawn between what actually happened to the claimant(s) and what they could have expected to receive had they not belonged to the protected group. Using the example of discrimination in compensation mentioned above, the plaintiffs would need to show how Population A and Population B are similarly situated. Statistics can be extremely valuable in constructing the “twin(s)” of the person in the protected group in such a manner that all characteristics except the reason for their being in a protected class remain the same.

Once a different but similarly situated group has been defined for comparison purposes, the next question is: does a difference/disparity exist? The disparity would lie in the difference between the situation of the claimant(s) and that of those that are similarly situated. Using the plaintiff's definition of a similarly situated group in our example, if the wage for Population A is \$9 per hour and the wage for similarly situated Population B is \$12 per hour, the difference of \$3 per hour would be the amount of the claimed disparity. While it is critical for a disparity to be present, it is also important to keep in mind the relevance and significance of the claimed disparity.

That leads to the next important question, is the disparity real? Just looking at the \$3 per hour wage difference between populations A and B is not enough to definitively determine the existence of disparate treat-

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# Practitioner's Corner

By Stanley E. Graham



**T**he field of labor and employment law continues to evolve. Some recent news and developments that may affect your practice include:

- The U.S. Department of Labor has developed a new section on its eLaws website devoted to Child Labor Laws. See <http://www.dol.gov/elaws/esa/flsa/cl/> for more information.
- The EEOC has issued new guidance on the interplay between the Americans with Disabilities Act and the FDA Food Code. Although applicable primarily to employers in the food service business, the guidance gives interesting insight into the EEOC's latest views on an employer's ADA obligations.

• The EEOC recently released its enforcement and litigation statistics for Fiscal Year 2004. Check out [www.eeoc.gov/stats/charges.html](http://www.eeoc.gov/stats/charges.html).

• The EEOC's February 15th press release can be found at [www.eeoc.gov/press/2-15-05.html](http://www.eeoc.gov/press/2-15-05.html)

• Resume fraud is now a crime in Tennessee. Tenn. Code Ann. § 39-17-112(b) makes it a Class A misdemeanor to "knowingly use or claim to have a false academic degree" to obtain employment or a promotion.

Do you have other news you think may be helpful to Section members? If so, please send it to [stan.graham@wallerlaw.com](mailto:stan.graham@wallerlaw.com).

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## Statistics

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ment. In many instances, for entirely non-discriminatory reasons, not all employees are paid the same, even when performance is similar. It is possible, when all known factors are accounted for, that there can still be random, non-discriminatory factor(s) contributing to the wage disparity. Statistics can aid in determining whether the difference in wages is due to random "noise" or an actual discriminatory act. A measure of a sample's standard deviation<sup>5</sup> is one of the most useful statistical methodologies used in comparing the differences between a plaintiff's actual, observed outcome and what they would expect in the absence of discrimination. Remembering the plaintiff's assumption from our example, (Population B is similarly situated to Population A) say we find that the data shows on average Population B's hourly wage is \$12 with a standard deviation of \$0.50. These statistical measurements imply that 95% of the employees' wages in Population B would fall within the range of \$11 ( $\$11 = \$12 - 2 * \$0.5$ ) and \$13 ( $\$13 = \$12 + 2 * \$0.5$ ), i.e. two standard deviations away from the mean (\$12). Because Population A's average wage of \$9 lies outside of the \$11 to \$13 range, we are more than 95% confident their outcome is truly different from Population B's. In other words, the disparity is statistically significant, and the differences are more than 95% likely the result of intentional discrimination rather than chance or other factors.

### II. THE SIGNIFICANCE OF STATISTICAL "SIGNIFICANCE"

A key element in a disparate treatment case is whether the disparate conduct was intended based on

illegal discriminatory factors. When all legitimate factors that could have an impact on the employment process are accounted for, there generally are only two explanations for a disparity: chance or an employer's intentional discriminatory behavior. For example, although statistical analysis may not necessarily demonstrate whether an employer terminated an employee because of his or her age, it may be able to show, with a certain amount of confidence, whether a disparity was accidental (e.g., caused by chance) or was intended. Stated differently, statistics can address whether the probability of the disparity occurring by chance is so small that one should rule out chance as the potential cause. As stated in *Hazelwood School District v. United States*, 433 U.S. 299, 311 n. 117 (1977): "if the difference between the expected value and observed number is greater than two or three standard deviations, then the hypothesis that employees were hired without regard to race is suspect."

Another challenge in establishing the presence of a "real" disparity is the practical significance of the difference. It may well be a waste of social resources to litigate a case with limited damages. It is important to note that a statistical significance does not necessarily imply practical significance.

For simple cases, comparisons of the average outcome between protected group and the similarly situated control group can establish the disparity. However, discrimination lawsuits can have many intricacies and may require more advanced statistical analysis. In a more complex case, it is important to account for all the relevant factors that are involved in the process. In other words, how are the possible the discriminatory effects separated and distinguished from other factors? A multiple regres-

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sion approach is a well-accepted statistical method to address these issues. Such an analysis helps separate the effects of different factors and quantify the impact of multiple concurrent stimuli upon a single variable. Using our example, the defense may want to argue that the plaintiffs were wrong in classifying Population B as similarly situated. They may argue that education and work experience also help determine an employee's wage. Population A tends to include less educated and less experienced employees, which is what leads to the disparity between the two groups. Using a multiple regression analysis, statisticians could study the relationship between wage and race and use work experience and education as a means to help single out the effect of race on wage. If possible, the defense would want to show through a multiple regression analysis that when work experience and education are controlled for, wages between Population A and Population B are not significantly different.

### III. THE ROLE OF STATISTICAL EVIDENCE

Statistical experts study a group in a relevant sample and analyze the pattern of outcomes. The results of the analysis, statistical evidence, address the average and allow inferences to be drawn regarding the sample. Statistical evidence typically is combined with other direct evidence determine the existence of unlawful discrimination.

Statistical analysis and evidence has become a widespread tool among claimant and defense lawyers alike. In a hypothetical example where a woman claims she has unfairly been held at the same salary or position for too long, both sides must closely study the promotion process and the different areas that could greatly affect the likelihood of a promotion. The effectiveness and value of statistical evidence should not be underestimated. In a proper case, statistics alone can constitute a prima facie proof of a pattern or practice of discrimination where gross discrepancies are evident (See *Hazelwood vs. United States*). For a defendant, especially when faced with an opposing statistical expert, it is beneficial to engage someone that can speak with authority on statistical issues and who can scrutinize the analysis offered by the claimant's experts for inconsistencies in approach and methodology.

To illustrate the importance of statistical evidence, in the trial involving Denice Scales against J.C. Bradford and Company,<sup>6</sup> the statistical evidence offered by Scales relied on a comparison of the average length between men's and women's promotions to the level of vice president and broker representative. The magistrate judge accepted the statistical evidence offered by claimant and in conjunction with other evidence found that a prima facie case of disparate impact discrimination had been established. This finding was appealed and the district court reversed, citing the failure of Scales' expert to

account for other factors, besides gender, that may have influenced promotion times. However, the United States Court of Appeals reversed and reinstated the magistrates finding since defendant did not offer an actual rebuttal of plaintiff's expert demonstrating what other factors could have effected promotion timing. Thus, having a clear understanding of what factors could or would affect promotion times was important in the statistical analysis of the promotion data.

The statistical significance of a disparity is a key element in a discrimination case. The three-step process for determining disparity is:

- Estimating the expected outcome for the protected group in the absence of discrimination,
- Comparing the expected and observed outcomes, and
- Testing the statistical significance;

This process can be difficult even in some of the seemingly simplest of cases. As statistical studies become more and more influential in labor discrimination lawsuits, it become increasingly vital for counsel to engage someone who has the expertise necessary in the world of statistics.

Statistics can also be as effective as an advisory tool outside of a litigation framework. If a client is seeking advice or a check-up on their regulatory compliance, statisticians can develop an accurate view of a company's demographics and employment trends. Being proactive by asking for an assessment or compliance audit is a good way to help your client locate potential problem areas early, and can go a long way in keeping them from being faced with a harmful litigation where millions of dollars could be on the line. Whether a company finds themselves in litigation or is simply trying to avoid it, statistical experts have proven to be a very valuable resource.

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<sup>1</sup>The opinions and views expressed in this article are those of the authors and do not necessarily reflect the opinions or views of LECG or its other employees.

<sup>2</sup>*Dukes, et al. v. Wal-Mart Stores, Inc.*, (N.D. Cal. No C-01-2252)

<sup>3</sup>*Bates v. UPS*, (C99-2216 THE)

<sup>4</sup>*Gonzalez v. Abercrombie & Fitch*, (03-2817 SI, 04-4730 SI and 04-4731 SI)

<sup>5</sup>Standard deviation measures how spread out a sample is, or how closely the sample approximates the average/mean.

<sup>6</sup>*Scales v. J.C. Bradford & Co.*, 925 F.2d 901 (6th Cir. 1991) 22

## ORGANIZED LABOR POISED FOR A COMEBACK

# Savvy leaders push to revitalize the movement

By John Jay Matchulat



Several developments over the past months signal that organized labor may finally have come to its collective senses in attracting American workers. It is no secret that the labor movement has been in a twenty-year funk. Union membership is at an all-time low with just 12.5 percent of the workforce in both public and private sectors belonging to unions in 2004, down from 12.9 percent in 2003. Only 8 percent of private sector workers were union members in 2004.

Aggressive, intelligent and creative leaders have emerged from several of the nation's most powerful and successful unions, and shown exceptional vision and the leadership skills to revive a labor movement that has been languishing for two decades. They have not only identified structural and institutional factors which have impeded the growth of membership, but have also developed approaches and strategies to unify the movement, produce sustained growth, and restore organized labor to a position of economic, social and political significance. These developments, leaders and their initiatives are discussed here.

### LEADERS OF THE LARGEST AND MOST ACTIVE UNIONS SEEK TO REFORM THE AFL-CIO, OR ESTABLISH A NEW SEPARATE, PROGRESSIVE LABOR FEDERATION

In early 2004, presidents of four large unions that are members of organized labor's umbrella alliance, i.e., the American Federation of Labor - Congress of Industrial Organizations ("AFL-CIO" or the "Federation"), formed an entity dubbed "New Unity Partnership" or "NUP" which they maintained until mid-January 2005. In its 12-month existence, NUP served as a catalyst to spark debate, engender criticism of the AFL-CIO and its many constituent unions and elicit proposals to revitalize America's labor movement.<sup>1</sup>

The proposals first advanced by NUP leaders reflected deep-seated disenchantment with the AFL-CIO's inability to advance labor's interests. NUP leaders saw this resulting from structural deficiencies within the Federation, as well as entrenched parochial views and self-interests of the heads of many of the Federation's constituent member unions.<sup>2</sup>

At the forefront of NUP was Andrew Stern, currently president of Service Employees International Union (SEIU), the nation's largest union, representing 1,800,000 workers in the healthcare, building services and security industries. Under Stern's leadership, SEIU has experienced phenomenal growth, while most other unions have sustained significant losses. Using highly aggressive and creative organizing methods, Stern has increased SEIU's

membership by 350,000 members over the past four years.<sup>3</sup>

Bruce Raynor, also among NUP's founders, had been president of Union of Needletrades, Textiles and Industrial Employees, also known as UNITE. With strongholds in the South, UNITE's 180,000 members work in the clothing, textile and laundry industries. On July 8, 2004, UNITE merged with the Hotel Employees and Restaurant Employees International Union (HERE). The consolidation added the 260,000 members of HERE, who work primarily in hotels, restaurants, and gaming industries on the West coast, with those of UNITE. The merged organization is called UNITE HERE. John Wilhelm, former president of HERE, was also among NUP's leaders.<sup>4</sup> Prior to the merger, both unions had been experiencing substantial success organizing new members. Both had large numbers of members among service workers, immigrant and minority groups in overlapping industries. By consolidating resources and eliminating duplication, UNITE HERE seeks to increase organizing activity in all of their represented industries.

Terrence O'Sullivan, president of Laborer's International Union of North America (LIUNA) and Douglas McCarren, president of Carpenters and Joiners of America (which severed ties with the AFL-CIO several years ago), were also among NUP's leaders.<sup>5</sup>

### PROPOSALS TO RESTRUCTURE THE AFL-CIO TO PROMOTE UNITY, STRENGTH, AND BARGAINING POWER

NUP leaders hoped to energize the labor movement by proposals to fundamentally change the Federation's structure, culture, and priorities. By forming NUP, its leaders challenged the Federation and its constituent unions to undergo drastic change. The implicit message was that, absent change, these four powerful and influential unions would leave the Federation and pursue labor's interests through their own alliance. Stern continues to assert that unless the Federation and its constituent unions accept and implement extensive changes, it has no hope for organizing any of the 90 percent of American workers who are not in unions.<sup>6</sup>

Among the charges which NUP leveled against the AFL-CIO is its failure to pare down the copious numbers of member unions, many of which have competing interests. NUP also saw the Federation's allowance of each member union to pursue its own self-interests and agendas as having stymied the development and implementation of strategies to organize workers through the exertion of unified strength in all sectors of the economy. NUP pointed out that each of the AFL-CIO's 65 member unions have long been permitted to organize within any industry they choose. This has

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resulted in some unions venturing into industrial jurisdictions traditionally organized by other established unions. In turn, they have negotiated contracts with lower pay scales and less desirable terms than those already established through years of bargaining by those unions that have traditionally organized and represented employees within an industry. Since the AFL-CIO neither coordinates, nor requires its member unions to coordinate, bargaining to achieve similar pay and benefit structures, there have been wide variations within various industries' wages and benefits - with the lower end providing a depressing effect upon terms throughout an industry. NUP leaders pointed out that fifteen unions now represent workers in the transportation and construction industries, while six unions represent employees in healthcare. Further, 55 unions within the Federation each represent fewer than 50,000 workers. Independently, they lack sufficient resources, strength and leverage to organize non-union workers or bargain effectively on their behalf.<sup>7</sup> NUP leaders also chastised the Federation for its inability to prevent smaller, weaker unions from conniving with employers to keep out larger and/or stronger labor organizations that could otherwise use their strength and leverage to improve terms and conditions of employment. Accordingly, NUP leaders sought to impose requirements that each union agree to uniform standards of conduct as a precondition for Federation membership.<sup>8</sup>

NUP leaders envisioned a labor movement with one unified approach for gaining global, national, community, and political strength - rather than 65 fragmented strategies. They also proposed that there be fewer, but much larger, unions that can use combined resources and strengths to develop and implement strategies focused on specific issues and specific industrial sectors. Raynor wants to see the number of labor unions reduced to 15 or 20 large organizations who are better able to organize non-union workers and exert considerably more bargaining power on their behalf.

Unification, through mergers and consolidations, was seen by NUP leaders as the blueprint for the labor movement's future. In effect, they took their cue from the corporate world. They recognized that in order to challenge corporations, which have grown larger and stronger through mergers and consolidations, unions within the Federation must likewise gain size and strength. The July 8 merger of UNITE and HERE coincided with NUP's view that unification provides strength and improves organized labor's chances of accomplishing its goals. More recently, in January 2005, the 575,000 active members of the United Steelworkers of America merged with the 275,000 members of P.A.C.E.<sup>9</sup> According to Raynor, large consolidated labor unions are capable of being powerful partners to "progressive" companies, or "powerful adversaries to compa-

nies that want to deny opportunities to their workers to organize and improve their employment conditions."<sup>10</sup>

NUP's existence and its various proposals succeeded in generating extensive debate within the labor movement. In the process, entrenched leaders of various unions not only directed visceral personal attacks at Stern and other NUP leaders, but characterized NUP as no more than a maverick reform movement. Its own leaders began seeing that NUP had successfully provoked the formulation of proposals for change from many other unions. They also sensed that its continued existence had become a distraction to the ultimate goal of constrictive change. Accordingly, its leaders disbanded NUP on January 19, 2005.<sup>11</sup>

### TOTAL COMMITMENT TO ORGANIZE WORKERS USING NEW STRATEGIES AND STREAMLINED METHODS

John Sweeney, the AFL-CIO's president for the past nine years, has totally embraced the organizing methods utilized by SEIU over the past four years. Sweeney points out that while he was president of SEIU, it took fifteen years to organize 600,000 workers, but in Stern's eight years at SEIU's helm, membership has exceeded 1,700,000. UNITE and HERE have also enjoyed exceptional success, largely due to each union's spending in excess of 50 percent of their budgets on organizing.

Both UNITE HERE and SEIU endorse "card check" and "neutrality" agreements as today's key methods to organize new workers. In the card check process, an employer agrees to voluntarily recognize a union when the union presents it with signed authorization forms from a majority of eligible employees. Employers entering into such agreements may also agree to remain neutral, engage in no anti-union campaign activity, and/or allow the union onto company property to solicit cards. Currently, card check recognition as a method to organize workers is lawful under the National Labor Relations Act (NLRA). However, the current law permits any employer (that is not subject to a card check or neutrality agreement) to refuse to recognize a union that claims to have cards signed by a majority of employees. This refusal, in turn, forces the union to file a petition with the National Labor Relations Board (NLRB) seeking to have the Government conduct a secret ballot election among employees on the issue of representation.

Variations on neutrality agreements provide that, rather than a card check, a secret ballot election will be conducted by a third party (e.g., an accounting firm). Such agreement may also provide that the employer will engage in no anti-union campaign activity, and/or will permit the union on the company's premises to campaign.

The labor movement's current penchant for card check and neutrality agreements stems from its asserted dissatisfaction with the NLRB's processing of union-filed petitions. Unions complain that NLRB processes

# Tennessee bill seeks to turn back the clock on overtime regulations

By Scott E. Schwieger



**D**emocratic Senator John Ford of Memphis and a coalition of nine Democratic House members from around Tennessee have filed identical bills to adopt as Tennessee law the federal overtime regulations in effect before August 23, 2004. The Senate bill, No. 73, was introduced on January 13, 2005; the House counterpart was introduced on January 31, 2005. Both bills are currently being discussed in committees, and may reach the floors of the Senate and House as early as March, 2005.

The bill would make Tennessee employees eligible for overtime under the pre-August 23, 2004 Department of Labor overtime regulations, regardless of whether they were employed before August 22, 2004. The law would not, however, retain the salary levels of the old regulations, but would incorporate the amended salary levels of 29 C.F.R. § 541.600.

The bill follows a failed attempt by Democrats to convince federal legislators to overturn the new overtime regulations, in passing the 2005 fiscal year budget. Critics

of the new overtime rules maintain that they allow employers to deny overtime to many more workers than the old rules. Supporters disagree, contending that over a million more workers are now entitled to overtime.

The Tennessee bill's effect – if passed – is unclear. Tennessee currently does not have an overtime law, and the bill does not provide for an enforcement mechanism. If Tennessee courts allow an employee to sue to enforce the law, an employer could be sued for violating Tennessee law, despite full compliance with federal regulations. At the least, the conflicting rules would place employers in a confusing situation in deciding which employees are entitled to overtime.

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are extremely slow, and that its procedures are subject to manipulation which delays employees' rights to gain representation. Richard Trumka, Secretary-Treasurer of the AFL-CIO, claims that only 20 percent of unions' new members were organized in the past year through NLRB processes. Bruce Raynor has stated that prior to the merger, 85 percent of employees recently organized by UNITE and HERE have been the result of card check agreements. Raynor also points to tens of thousands of casino workers in Las Vegas organized by HERE through card check means, and that UNITE became the bargaining representative of 14,000 distribution center employees of T. J. Maxx using the same process.<sup>12</sup>

Both Raynor and Stern have shown no reluctance to subject employers that refuse to enter into neutrality or voluntary card check agreements to bitter "corporate campaigns." For example, Cintas, a nationwide provider of uniform and laundry service, has refused to agree to card check recognition. In response, UNITE and the Teamsters partnered to exert pressure on Cintas through a nationwide campaign that included the filing of numerous unfair labor practice charges with various regional offices of the NLRB, as well as the filing of lawsuits alleging race and sex discrimination. Additionally, UNITE HERE, in collaboration with various environmental groups has accused Cintas of improper disposal of waste materials. As Raynor puts it, "Cintas has got a decision to make. Does it stay in the uniform business or in the union-fighting business?"<sup>13</sup>

Organized labor also garnered political clout in its efforts to impose the card check recognition process on employers. Senators Edward Kennedy (D-Mass) and Rep. George Miller (D-Cal) introduced legislation in late 2003, termed the "Employee Free Choice Act" (S. 1925; HR 3619). This would require the NLRB to certify a union as bargaining representative upon the union's showing that a majority of workers signed union authorization forms. This, in effect, would eliminate the employer's long-standing right to demand that the issue of representation be decided by employees through an NLRB-conducted secret ballot election. Supporters of the bill assert that organizing through NLRB processes takes years, and that approximately one-third of the unions that do become certified through NLRB elections never obtain first contracts - which they attribute to administrative and/or employer-created delays attendant to NLRB law and procedures. The proposed legislation, *inter alia*, would require mediation after 90 days of negotiations for a first contract, and arbitration 30 days thereafter to resolve all open issues.

## TARGETING IMMIGRANTS AND INDUSTRIES EMPLOYING THEM

After decades of opposition to immigrants in the American labor force, organized labor, within the past five years, has embraced the multitudes of legal and illegal foreign national workers. With estimates that more than 9,000,000 immigrants are working illegally in the United States, organized labor now sees this

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immense pool of foreign national workers having the potential to vastly offset losses of membership from in the manufacturing sector. The federal immigration and labor statutes afford both legal and illegal immigrants the same rights and protections to organize and participate in union activities as those of U.S. citizens.

Large segments of the legal and illegal immigrant population work in service-oriented industries and/or entry-level positions where typically, there is a high degree of job dissatisfaction. Organized labor vows to continue targeting those areas, including hospitals, nursing homes, laundry service, light manufacturing, food service, apparel and textile manufacturing. The labor movement, however, must craft and implement marketing strategies which will allay the fears (or disinterest) of immigrants to engage in protected union activities, and convince them that unionization would make a positive difference in their lives.

### IMPLEMENTATION OF GLOBAL STRATEGIES AND COORDINATION WITH OVERSEAS UNIONS

Andrew Stern has also urged the AFL-CIO to forge partnerships with unions in other countries as part of an effort to reach global agreements with multi-national corporations. At its June 2004 convention, SEIU resolved to become the first global union. It seeks to participate with overseas unions in formulating joint campaigns and strategies to deal with the same employers, industries, and sectors existing both in the United States and abroad. Stern sees SEIU's immense strength and resources as formidable weapons to help partnering unions arrive at global agreements with global employers.<sup>14</sup> He has also called on all AFL-CIO unions to undertake a global campaign against Wal-Mart. Stern contends that Wal-Mart's size and low prices epitomize the way that huge corporations have a depressing impact on domestic pay and benefits which, in turn, results in a worldwide decline in living and working standards.

SEIU and UNITE HERE have already joined forces to work with overseas unions to organize employees of multi-service out-sourcing companies. These include Sodexo, with operations in 76 countries; Compass, with operations in 90 countries; and Aramark, operating in 19 countries. The 1,100,000 employees of these multi-national companies work in various cleaning, food service, laundry, transportation, and maintenance jobs. They are contracted out to institutions such as schools, universities, government, plus office buildings, hospitals and nursing homes. Stern sees these large, strong corporations as being far more aggressive and global in what he sees as their concerted efforts to depress the plight of the world's workers. In Stern's view, to confront and challenge these corporate mammoths, U.S. unions must acquire the additional strength which results from a global approach which includes, inter alia, forging such alliances with overseas unions.

### INTERNET-BASED INITIATIVES TO REACH SUPPORTIVE NON-UNION WORKERS

In June 2004, Stern announced the creation of a new, innovative virtual labor organization, which is not tied to the workplace or dependent on recognition by any employer. Calling this a "radical new way to think about organized labor," Stern described an "open source union" fashioned after the computer industry practice of giving open access to program codes to encourage innovation. Non-union workers and/or those who are not covered by an SEIU contract are allowed to sign up, become members, and pay a nominal annual membership fee. Stern's initiative, entitled "Purple Ocean" (SEIU's official color is purple) seeks to gain strength for the labor movement by bringing in at least 1,000,000 additional workers through the internet.<sup>15</sup>

### CONCLUSION

Actions and pronouncements of the union leaders who comprised the now-defunct NUP reflect thinking that is well outside the box. They have grappled with the root causes of unionism's decline. They have developed a vision, methodologies and aggressive strategies holding the potential to once again make organized labor a "player" in American politics, culture and the economy. They generated debate and evoked other proposals. Should the AFL-CIO and its other constituent member unions fail or refuse to adopt reforms originally sought by NUP and now by other unions, NUP's founders and any other unions sharing their views can be expected to sever ties with the Federation and advance their views for America's labor movement through a second major labor alliance.

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Footnotes:

<sup>1</sup> *Daily Labor Report (BNA)*, No. 08 at A-2 (January 12, 2005).

<sup>2</sup> *Daily Labor Report (BNA)*, No. 119 at C-1 (June 22, 2004)/ No. 120 at C-1 (June 23, 2004); No. 132 at B-1 (July 12, 2004); No. 38 at AA-2 (February 27, 2004).

<sup>3</sup> *Id.*

<sup>4</sup> *Daily Labor Report (BNA)*, No. 131 at A-9 (July 9, 2004).

<sup>5</sup> *Id.*

<sup>6</sup> *Daily Labor Report (BNA)*, No. 119, at C-1 (June 22, 2004).

<sup>7</sup> *Daily Labor Report (BNA)*, No. 120 at C-1 (June 23, 2004); No. 132, at B-1 (July 12, 2004).

<sup>8</sup> *Daily Labor Report (BNA)*, No. 38, at AA-1 (February 27, 2004); No. 139, at A-9 (July 9, 2004).

<sup>9</sup> *Daily Labor Report (BNA)*, No. 8, at A-2 (January 12, 2005).

<sup>10</sup> *Daily Labor Report (BNA)*, No. 107, at C-1 (June 4, 2004).

<sup>11</sup> *Daily Labor Report (BNA)*, No. 14, at C-1 (January 24, 2005)

<sup>12</sup> *Daily Labor Report (BNA)*, No. 107, at C-1 (January 4, 2004).

<sup>13</sup> *Id.*

<sup>14</sup> *Daily Labor Report*, *supra*, note 6.

<sup>15</sup> *Id.*

# Recent Developments from the U.S. Supreme Court

By Scott E. Schwieger

In the past year, the U.S. Supreme Court has taken on some key issues in employment law, ranging from a clarification of the two modes of analysis available in discrimination cases to standardizing the statute of limitations for claims of discrimination in the employment relationship brought under 42 U.S.C. § 1981. The Court has also granted certiorari in several cases which will further impact employment law when they are decided. Here is a summary of some of the significant employment decisions of the Court in the past year or so, as well as a preview of cases to watch.

## SUPREME COURT OPINIONS

### Disparate Treatment and Disparate Impact Models Don't Mix

*Raytheon Co. v. Hernandez*, 540 U.S. 44, 124 S. Ct. 513, 157 L. Ed. 2d 357 (December 2, 2003)

A unanimous Supreme Court held that the disparate treatment and disparate impact models are distinct, and cannot be blended. An employee resigned, to avoid being fired, after testing positive for cocaine. When he reapplied with the company a few years later, the company refused to hire him based on a policy of not rehiring former employees who had violated workplace conduct rules. The employee sued under the Americans with Disabilities Act ("ADA"), alleging that he was the victim of disparate-treatment disability discrimination.

The Ninth Circuit held that the no re-hire policy could not be a legitimate, non-discriminatory reason for refusing to rehire him because the policy, while facially neutral, fell harder on those former employees with the disability of drug addiction, when applied in cases where the misconduct was drug use.

The Supreme Court reversed, holding that because the employee was proceeding only on a disparate treatment theory (i.e., that the employer treated him differently because of his disability), it was improper for the court to consider the effect of a facially neutral policy on the whole class of applicants with disabilities. This analysis is reserved for disparate impact claims, which the employee had not made, and the two types of claims do not mix.

This case provides an important lesson for counsel for employees and employers. Employees suing must clearly delineate theories of recovery early in the litigation, while counsel for employers must be wary of the employee's attempt to switch horses in midstream, or at least to cloud the issues. It also provides a reminder of the two distinct theories of recovery under the anti-discrimination statutes, showing employers that they must not only avoid treating someone differently on the basis of a protected characteristic, but also must ensure that their practices do not fall harder on people with protected characteristics.

**ADEA Does Not Outlaw Reverse Age Discrimination**  
*General Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 124 S.Ct. 1236, 157 L.Ed.2d 1094 (February 24, 2004)

The Court ruled that the Age Discrimination in Employment Act ("ADEA") does not protect younger workers from discrimination in favor of older workers, despite the plain language of the statute – making it illegal to “discriminate against any individual . . . because of such individual's age” – and the EEOC's interpretation outlawing reverse age discrimination. The plaintiffs were employees between the ages of 40 and 49 who contended that cutting back on the retirement benefits of all its employees under 50, but preserving full benefits for those over 50, was actionable under the ADEA. The Supreme Court disagreed, reasoning that a review of the history of the ADEA's passage showed that it was enacted to combat only discrimination against older workers in favor of younger ones.

This is a loss for younger employees who believe they have been treated less favorably than their older counterparts, based on age. This decision forecloses the possibility of recovery under the ADEA. For employers, the decision is a victory, allowing them, in limited situations, to make business decisions like the one General Dynamics made, reducing retirement benefits to employees, and using age as a demarcation. In foreclosing an entire genre of cases, the opinion also means less exposure for the employer.

### Take Your Sweet Time in Bringing a § 1981 Post-Hire Race Discrimination Claim

*Jones v. R.R. Donnelly and Sons Co.*, 541 U.S. 369, 124 S.Ct. 1836, 158 L. Ed. 2d 645 (May 3, 2004)

A unanimous Court held that the four year catch-all statute of limitations in 28 U.S.C. § 1658(a), which by its terms applies to all causes of action arising under federal statutes enacted after December 1, 1990, applies to claims brought under 42 U.S.C. § 1981, as amended in 1991. The original version of § 1981, enacted as the Civil Rights Act of 1866, prohibited only race discrimination in the formation of contracts. In 1991, Congress expanded the coverage of § 1981 to prohibit race discrimination within a contractual relationship. While the original § 1981 prohibited race discrimination in the hiring process, the 1991 amendments expanded coverage to the entire employment relationship. When Jones brought a racial harassment claim under § 1981, the Court applied the four-year limitations period because her claim “arose under” a portion of § 1981 enacted after December 1, 1990.

This decision is a boon to employees and a big loss for employers. It brings uniformity to the statute of

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limitations for post-hire race discrimination claims under § 1981. Previously, most courts had applied analogous state statutes of limitations, which ranged from 6 months to 10 years. Thus, the decision opens wider the door for employees in many jurisdictions where the limitations period was shorter than four years.

It also arguably pushes Title VII and the EEOC conciliation process further into obsolescence for post-hire race discrimination claims. Section 1981 is a much more attractive route for employees because it does not have the administrative exhaustion requirement or the limitations on damages found in Title VII.

It is important to note that the Court left open the question of the applicable statute of limitations period for those claims brought under the original version of § 1981, claims for race discrimination in hiring. These appear still to be governed by the most applicable state statute of limitations, as these claims arise under an act of Congress enacted before December 1, 1990.

### **Allegation of Constructive Discharge Does Not Leave Employers Defenseless in Harassment Cases**

*Pennsylvania State Police v. Suders*, — U.S. —, 124 S.Ct. 2342, 159 L.Ed.2d 204, (June 14, 2004)

The Supreme Court held that in hostile work environment harassment cases, an employee's allegation that she resigned because it was the only reasonable response to the sexual harassment she was being subjected to by her supervisors does not by itself strip the employer of an affirmative defense, thus leaving the employer strictly liable for the supervisors' acts. In cases involving supervisor harassment, the employer is automatically vicariously liable where the harassment culminates in a tangible job action such as termination, demotion, docked pay, or cut benefits. Where the harassment does not involve an official job action, the employer can avoid liability by affirmatively showing that it had taken reasonable measures to combat harassment (such as by implementing a harassment reporting policy and procedure) and that the employee unreasonably failed to take advantage of these measures (such as by not reporting the harassment).

The employee, who had been subjected to vulgar sexual harassment by her supervisors and quit as a result, argued that her constructive discharge should be equated with a traditional discharge, and thus considered a tangible job detriment, stripping the employer of the affirmative defense. The Supreme Court disagreed, holding that where the employee's resignation was precipitated by harassment that did not itself involve a tangible job detriment, the employer could assert the affirmative defense. If, on the other hand, the employee quit in response to harassment involving a tangible job detriment – termination, demotion, transfer to a less desirable position – then the employer would be automatically vicariously liable.

This is a loss for employees, effectively writing out the constructive discharge doctrine from the law of discriminatory harassment. Once again, the Court gives a valuable reminder to employers that sexual or other types of unlawful harassment cannot be tolerated. This case underscores the need for employers to confirm the business reasons justifying the job actions be taken against employees. If the action is detrimental and motivated by a desire to harass, then company approval of the job action can lead to automatic vicarious liability.

### **Public Employee's Striptease Not a Matter of Public Concern**

*City of San Diego v. Roe*, — U.S. —, 125 S.Ct. 521, — L. Ed. 2d — (December 6, 2004)

A unanimous Court held that the San Diego Police Department could terminate one of its officers who was selling homemade videos of himself stripping out of a police uniform and performing sexual acts. The Court held that the officer's conduct which was designed to exploit his position as a police officer was not a "matter of public concern," and therefore the City need not show a governmental justification for terminating him, to comply with the First Amendment. The Court noted that matters of public concern are newsworthy items "of general interest and of value and concern to the public at the time of publication." When the employee speaks on such a matter, a public employer cannot punish the employer without violating the First Amendment, unless the employer can show that there is a valid governmental interest that outweighs the employee's right to speak on the matter.

This case takes a common sense approach in upholding the right of a public employer to discipline an employee for extreme conduct. A public employer must always be wary of disciplining an employee for statements made about the employer; however, this concern need not paralyze the employer where the statements or conduct is clearly not a constructive addition to the public forum.

### **SUPREME COURT GRANTS OF CERTIORARI - OCTOBER 2004 TERM**

#### **Can an Educator Sue Alleging Retaliation for Complaining About a Title IX Violation?**

*Jackson v. Birmingham Bd. of Educ.*, 309 F.3d 1333 (11th Cir. 2002), cert. granted (June 14, 2004)

The Supreme Court will decide if an employee of an educational institution has a cause of action for retaliation for reporting sex discrimination under Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 et seq. A girls high school basketball coach complained to the administration that his team was not getting funding and access to facilities equal to the boys basketball team. He ultimately lost his coaching job, and brought suit for retaliation. The Eleventh Circuit upheld dismissal of his complaint, reasoning that while

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Title IX did confer a private right of action on direct victims of sex discrimination, it did not confer an action to indirect victims, i.e., victims of retaliation.

Title IX provides that “no person . . . shall on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity” receiving federal funding. 20 U.S.C. § 1681(a). The statute also creates an elaborate administrative enforcement scheme authorizing the agency charged with providing funding to the educational program to cut off funding if the program has violated Title IX. 20 U.S.C. § 1682. While 34 C.F.R. § 100.7(e) provides that Title IX also prohibits retaliation for complaining about violations, the Eleventh Circuit, focusing on the text of Title IX, concluded that Congress had expressed no intent to provide a private right of action for retaliation. Instead, the administrative enforcement mechanism, subject to judicial review, is the exclusive remedy.

This decision will have substantial effects on educational employers who must fashion balanced educational, athletic, and extra-curricular programs for male and female students. If the Court recognizes a private right of action, educational employees will be have greater security in speaking out against disparities based on sex, and employers will face greater exposure to potential liability in employee relations, when they involve Title IX compliance.

### Does the ADEA Allow for Disparate Impact Claims?

*Smith v. City of Jackson*, 351 F.3d 183 (5th Cir. 2003), cert. granted (March 29, 2004)

The Supreme Court will determine whether the Age Discrimination in Employment Act, (“ADEA”) allows for disparate impact claims. The Fifth Circuit Court of Appeals held that the ADEA does not, and that the Jackson, Mississippi police officers’ claims that the city’s pay plan provided larger salary increases to police officers and dispatchers under the age of forty were not actionable.

The Fifth Circuit, following decisions of the First, Seventh, Tenth, and Eleventh Circuits, reasoned that the ADEA, unlike Title VII, allows employers to take actions that would be otherwise prohibited, if they are based on “reasonable factors other than age,” 29 U.S.C. § 623(f)(1). These courts also contrasted the purpose of the ADEA, which is narrowly limited to protecting individuals against arbitrary age discrimination in employment, with the purpose of Title VII, the broader goal of achieving equality of employment opportunities and removing barriers that have operated in the past to favor an identifiable group of white employees.

The Court parted company with the Ninth, Second, and Eighth Circuits which have allowed disparate impact claims under the ADEA, reasoning that the ADEA, which prohibits discrimination “because of [an] individual’s age,” should be read and interpreted consistently with Title VII,

which prohibits discrimination “because of [an] individual’s race, color, religion, sex, or national origin.” Because Title VII allows for disparate impact claims, these courts conclude that the ADEA should too.

This decision will be crucial for all employers. If the Supreme Court sanctions disparate impact claims under the ADEA, prudent employers will need to review every workplace policy and procedure to determine whether it falls harder on workers over 40 than on younger workers.

### Will the ADA Sail the High Seas?

*Spector v. Norwegian Cruise Line Ltd.*, 356 F.3d 641 (5th Cir. 2004), cert. granted (September 28, 2004)

The Fifth Circuit held that the Title III of the Americans with Disabilities Act (access provisions) does not apply to foreign-flagged cruise ships sailing in United States waters. General maritime law holds that when a ship enters another country’s waters, it subjects itself to the laws of that country. Relying on this and the opinions of the Eleventh Circuit Court of Appeals and the Department of Justice, a group of disabled individuals and their com-

panions sued a cruise line seeking to force compliance with Title III of the ADA on cruise ships flying the Bahamian flag, while these ships were in U.S. territorial waters. Compliance with Title III would require architectural modifications to the ship such as wheelchair ramps and handicap accessible bathrooms, as well as modifications to emergency evacuation procedures on the ship. The Fifth Circuit upheld summary judgment for the cruise line, reasoning that if Congress had wanted to make the ADA applicable to these ships, it would have said so in the statute. This was the same reasoning used by the Supreme Court in concluding that Title VII does not apply to U.S. citizens employed overseas by U.S. companies, in *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 111 S. Ct. 1227, 113 L. Ed. 2d 274 (1991).

This decision will have important implications in the employment context. If the Supreme Court rules that Title III of the ADA applies to these foreign-flagged ships, then Title I, prohibiting disability discrimination in employment, will almost certainly come next.

### How Much Time Does a Fired Whistleblower Have to Sue?

*United States ex rel. Wilson v. Graham County Soil & Water Conserv. Dist.*, 367 F.3d 245 (4th Cir. 2004), cert. granted (January 7, 2005)

The Supreme Court will decide whether the six-year

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statute of limitations provided for under the federal False Claims Act ("FCA"), rather than the most analogous state statute of limitations, applies to claims of retaliatory discharge for filing FCA claims. The Fourth Circuit held that the six-year limitation applies, rather than North Carolina's three-year limitation for wrongful termination actions, in allowing a secretary's claim that she was fired for bringing a complaint that her coworkers were submitting false claims to the federal government. The Fourth Circuit's decision was consistent with a Seventh Circuit Decision, and contrary to an opinion issued by the Ninth Circuit.

Employers who operate programs funded by the fed-

eral government must be careful not to retaliate against employees who allege that the employer has been dishonest in the reimbursement claims it submits to the Government. This case will settle the relevant limitations period for claims of retaliation brought against the employer by the whistleblowing employee.

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