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## UPDATE

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### SUPREME COURT

- *The Hertz Corp. v. Friend*, \_\_\_ U.S. \_\_\_, 2010 U.S. LEXIS 1897 (2/23/10) (A company's "principal place of business" for purposes of federal diversity jurisdiction is the state where its "nerve center" is located, i.e., the state from which its officers direct, control and coordinate the company's activities).
- *Union Pacific Railroad Co. v. Brotherhood of Locomotive Engineers and Trainmen*, \_\_\_ U.S. \_\_\_, 2009 U.S. LEXIS 8943 (12/8/09) (National Railway Adjustment Board has jurisdiction over a case even if the parties did not, first, engage in the pre-arbitration conference required by the Railway Labor Act, because the Congressional act that conferred jurisdiction upon NRAB does not condition NRAB's jurisdiction on such a conference).
- *New Process Steel v. NLRB*, case no. 08-1457 (certiorari accepted, oral argument to be held on 3/23/10) (Whether NLRB had authority to reduce its statutorily mandated three-member quorum to two).
- *Lewis v. Chicago*, case no. 08-974 (certiorari accepted, oral argument on 2/22/10) (Whether the deadline to file a charge of disparate impact runs from the date that allegedly discriminatory test results are announced or from each date thereafter when non-protected class members are hired over protected class members).
- *City of Ontario v. Quon*, case no. 08-1337 (certiorari accepted, oral argument to be held on 4/19/10) (Whether a police officer, who was exchanging sexually explicit text messages on his police-department issued pager, had a reasonable expectation of privacy in that pager).
- *NASA v. Nelson*, case no. 09-530 (certiorari accepted, oral argument to be scheduled) (Whether NASA may conduct background checks of "low risk" contract employees where such checks allegedly include questions that are open-ended and private).

## EEOC

- EEOC proposed regulations to implement the ADA Amendments Act, 74 Fed. Reg. 43431-48450 (9/23/09).
- EEOC notice of proposed rulemaking to outline defenses available in disparate impact age discrimination cases, 75 Fed. Reg. 7212-7218 (responding to *Smith v. City of Jackson*, 544 U.S. 228 (2005) and *Meacham v. Knolls Atomic Power Lab*, 128 Sup.Ct. 2395 (2008)).

## IMMIGRATION REFORM

- *U.S. v. Edmondson*, 594 F.3d 742 (10th Cir. 2/2/10) (A divided Tenth Circuit upheld the e-Verify requirements of Oklahoma's immigration-reform law, but unanimously affirmed the trial court's injunction against its discrimination and tax provisions holding they conflicted with/were preempted by federal law).

## GENERAL EEO

- *Johnson v. Weld County*, \_\_\_ F.3d \_\_\_, 2010 U.S.App.LEXIS 2595 (10th Cir. 2/8/10) (An affidavit that is, itself, inadmissible hearsay is insufficient to create a genuine issue of material fact capable of withstanding summary judgment; also a thorough overview of the blackletter law on both direct and indirect disparate-treatment discrimination claims).
- *Robinson v. Cavalry Portfolio Services, LLC*, \_\_\_ F.3d \_\_\_, 2010 U.S.App.LEXIS 2723 (10th Cir. 2/10/10) ("(C)omplaining about an isolated racial slur is not opposition protected by Title VII"; also a thorough overview of retaliation claims).
- *Lewis v. Heartland Inns of America, LLC*, 591 F.3d 1033 (8th Cir. 1/21/10) (Like the female plaintiff in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), who was told she was "macho" and needed "a course at charm school," this plaintiff -- whose style was "slightly more masculine" along the lines of "an Ellen DeGeneres kind of look" -- asserted a viable claim of sex-stereotyping, sufficient to withstand summary judgment, even though she lacked comparator evidence that similarly-situated males were treated more favorably, because she was allegedly told she lacked a "Midwestern girl look").
- *Budde v. Kane County Forest Preserve*, \_\_\_ F.3d \_\_\_, 2010 U.S.App.LEXIS 4532 (7th Cir. 3/4/10) (Summary judgment affirmed against police chief who "decided to drive home after drinking four or five glasses of wine at the Moose Lodge," then rear-ended a car, and tested for a blood alcohol content of 0.23, "nearly three times the legal limit in Illinois." Even if his alcoholism was a disability, he was terminated for his conduct, not his disability. His driver's license had been suspended, so he could no longer perform an essential duty of his job, driving; therefore, he was no longer a "qualified individual with a disability.").
- *Chavez-Rodriguez v. Santa Fe*, \_\_\_ F.3d \_\_\_, 2010 WL 548277 (10th Cir. 2/18/10) (Speech by the director of Santa Fe's Division of Senior Services was not protected under *Garcetti v. Ceballos*, 547 U.S. 410 (2006) because it flowed from her official duties; her speech included telling a variety of people, including the New Mexico Speaker of the House, that her Division was "in jeopardy of being dismantled").

- *Schuler v. PriceWaterhouseCoopers, LLP*, \_\_\_ F.3d \_\_\_, 2010 U.S.App.LEXIS 2998, \*12-\*13 (D.C.Cir. 2010) (The decision not "to promote an employee to a higher paying position is not a 'compensation decision or other practice' within the meaning of" the Lily Ledbetttter Fair Pay Act; therefore, plaintiff's claims were untimely).
- *EEOC v. Boot*, 2010 U.S.Dist.LEXIS 11125 (N.D.Iowa 2/9/10) (A \$4-million award of costs and sanctions was entered against the EEOC given its "failure to investigate and attempt to conciliate" prior to suing).

#### FRCP

- Federal Rules of Civil Procedure (revised eff. 12/1/09), and see related changes to the Local Rules for the United States District Court for the District of Colorado.

#### STATE LAW AND MISCELLANEOUS

- *Conrad v. Phone Directories Co., Inc.* 585 F.3d 1376 (10th Cir. 11/10/09) (Under the FAA, a defendant must move to compel arbitration, not move to dismiss for failure to arbitrate).
- *Warfield v. Beth Israel Deaconess Medical Center, Inc.*, 910 N.E.2d 317 (Mass. 2009) (A claim of discrimination need not be arbitrated under an employment agreement that provided for arbitration of claims and disputes arising from or in connection with the agreement or its negotiation; at least under Massachusetts state law, a discrimination claim only needs to be arbitrated if the agreement expressly requires arbitration of discrimination claims).
- *Ragone v. Atlantic Video*, 2010 U.S.App.LEXIS 3018 (2nd Cir. 2/17/10) (In the ESPN/Woody Paige case that has seen general media attention, the court held that a plaintiff may be compelled to arbitrate claims against a non-signatory to an arbitration agreement, when those claims are "sufficiently intertwined with her claims against a signatory").
- *LVRC Holdings LLC v. Brekka*, 581 F.3d 1127 (9th Cir. 2009) (Declining to follow *Intl. Airport Centers, LLC v. Citrin*, 440 F.3d 418 (7th Cir. 2006), the Ninth Circuit held that an employee does not automatically access his company-owned computer "without authorization," and thereby violate the Computer Fraud and Abuse Act, when he uses it in violation of his duty of loyalty). Note: The Ninth Circuit's decision has already drawn criticism, e.g., *Guest-Tek Interactive Entertainment, Inc. v. Pullen*, 665 F. Supp. 2d 42, \*46 (D.Mass. 2009), c.f., *ReMedPar, Inc. v. AllParts Med., LLC*, 2010 U.S. Dist. LEXIS 152, \*17 (M.D.Tenn. 2010).

#### NLRB

- *Laborers' Intl. Union of N.A., Local 578 v. NLRB*, 594 F.3d 732 (10th Cir. 2/2/10) (A union violated the NLRA, sec. 8(b)(1)(A), by demanding the discharge of an employee for failure to pay dues, without first giving that employee notice, a calculation of the amount owed, and a deadline for payment).
- "Casehandling (Memorandum) Regarding Application Spielberg/Olin Standards," NLRB General Counsel Memorandum OM 10-13(CH), addressing implications of *14 Penn Plaza, LLC v. Pyett*, 129 S.Ct. 1456 (2009), *Plumbers & Pipefitters Local Union No. 520*

*v. NLRB*, 955 F.2d 744 (D.C.Cir. 1992), and *Titanium Metals corp. v. NLRB*, 392 F.2d 439 (D.C.Cir. 2004).

## OSHA

- OSHA's proposed regulations to add a new column to the OSHA 300 log of recordable injuries and illnesses for musculoskeletal disorders, 75 Fed.Reg. 4728-4741.
- OSHA's 2010 budget requests a \$51-million increase to fund, in part, an additional 130 compliance officers, <http://www.dol.gov/budget/presentation.htm>.
- OSHA has begun issuing so-called "egregious" fines on a per-employee basis (not just for PPE-related citations), [http://www.osha.gov/dep/bp/Fact\\_Sheet-BP\\_2009\\_Monitoring\\_Inspection.html](http://www.osha.gov/dep/bp/Fact_Sheet-BP_2009_Monitoring_Inspection.html).