WIMBERLY LAWSON SEALE WRIGHT & DAVES, PLLC

Attorneys & Counselors at Law

Knoxville Office
Bank of America Building, Suite 601
550 Main Avenue
P. O. Box 2231
Knoxville, Tennessee 37901-2231
Phone: 865-546-1000/Fax: 865-546-1001

Morristown Office
929 West First North Street
P.O. Box 1066
Morristown, Tennessee 37816-1066
Phone: 423-587-6870/Fax: 423-587-1479

Nashville Office
200 Fourth Avenue South
Suite 900
Nashville, Tennessee 37219
Phone: 615-727-1000/Fax: 615-727-1001

Cookeville Office
1420 Neal Street - Suite 201
P.O. Box 655
Cookeville, Tennessee 38503-0655
Phone: 931-372-9123/Fax: 931-372-9181

Affiliated Office
Wimberly, Lawson, Steckel, Nelson & Schneider, PC
Atlanta, Georgia

Affiliated Office
Wimberly, Lawson, Suarez & Russell, LLC
Tampa, Florida

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Wimberly Lawson Daniels & Brandon
Greenville, South Carolina

THE EAGLE'S VIEW

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DIVERSITY, AFFIRMATIVE ACTION PREVAIL IN EDUCATION

In the first U.S. Supreme Court ruling on affirmative action in education in twenty-five years, a majority of the Court rules that student body diversity is a compelling state interest that can justify the use of race in admissions at the law school at the University of Michigan. In a companion case, involving the same school's undergraduate admissions policy, the Court struck down an admissions policy that it deemed not narrowly drawn to achieve the university's goal of creating diversity in the classroom. Gratz v. Bollinger, 91 FEP Cases 1803 (6/23/03); Grutter v. Bollinger, 91 FEP Cases 1761 (6/23/03).

In the Court's last affirmative action ruling, twenty-five years ago in the Bakke case, there was no Court majority, but Justice Powell wrote a concurring opinion approving of the use of race to further an interest of student body diversity in the context of public higher education. Since then, many public and private universities have modeled their admissions programs on the views expressed in Powell's opinion, including his view that universities can use race, among a range of factors, to obtain a diverse student body. Powell's view is now adopted by a 5-4 majority of the U.S. Supreme Court in the opinion written by Justice Sandra Day O'Connor.

O'Connor agreed with the lower court findings that the law school admissions policy promotes cross-racial understanding, helps break down racial stereotypes, enables students to better understand persons of different races, and makes classroom discussions more enlightening. She also appeared to place great significance on several amicus (friend of court) briefs filed by major businesses, military leaders and educational groups, asserting that the diversity is necessary for developing effective employees and officers in the military. Justice O'Connor indicated, however, that "the goal of attaining a critical mass of under-represented minority students does not transform its program into a quota," noting that the law school "engages in a highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment."

O'Connor went on to state, however, that to be constitutional, "race-conscious admissions policies must be limited in time." She concluded that "we expect that twenty-five years from now the use of racial preferences will no longer be necessary to further the interests approved today."

Four justices dissented. Chief Justice William Rehnquist argued the law school's program bore no relation to its asserted goal, arguing that the program was really a naked effort to achieve racial balancing. Justice Kennedy in dissent concluded that "the concept of critical mass is a delusion used by the law

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school to mask its attempt to make race an automatic factor in most instances and to achieve numerical goals indistinguishable from quotas." Justice Thomas, the Court's only African-American member, began his dissenting opinion by quoting an 1865 passage from abolitionist Frederick Douglass that whites should not interfere with blacks and instead should let them stand on their own legs. He argued that "what lies beneath the Court's decision today are the benign notions that one can tell when racial discrimination benefits (rather than hurts) minority groups." Justice Thomas goes on to contest the notion that the law school's policy benefits those admitted as a result of it, arguing that "these programs stamp minorities with a badge of inferiority and they cause them to develop dependencies or to adopt an attitude that they are 'entitled' to preferences."

In the second case, a 6-3 majority of the Court strikes down the University of Michigan's undergraduate admissions policy, where an applicant automatically receives twenty points if he or she is a member of an under-represented minority group. The majority opinion, written by Justice Rehnquist, emphasizes the importance in Justice Powell's opinion in Bakke of "considering each particular applicant as an individual, assessing all of the qualities that individual possesses, and in turn, evaluating that individual's ability to contribute to the unique setting of higher education." Justice O'Connor sums up the crucial differences between the policies upheld in the law school admission and found unlawful in the undergraduate admission, by explaining that unlike the law school admissions policy, the procedures employed by the University of Michigan undergraduate admissions do not provide for a meaningful individualized review of applicants.

The Perspective article of this newsletter contains comments on these important rulings and their application to the employment setting.

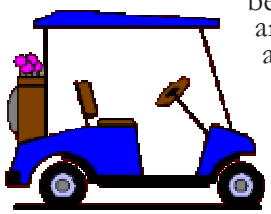
KNOW YOUR ATTORNEY

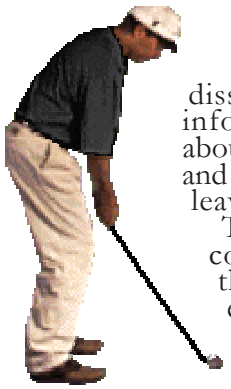
JUDITH A. DEPRISCO

Judith is an Associate with Wimberly Lawson Seale Wright & Daves, PLLC, in Knoxville, Tennessee, and practices in the areas of employment law, workers' compensation, premises liability and casualty loss. Her experience also includes employment discrimination, professional liability and commercial law. She is a member of the Tennessee Bar Association and the Knoxville Bar Association, and a former member of the American Bar Association's Banking and Regulatory Agency Committee. She obtained her Doctor of Jurisprudence degree from the University of Tennessee in Knoxville, where she was a member of the Moot Court Board, was awarded the Advocate's Prize, and was a staff writer for the *Tennessee Judicial Newsletter.*

Worker Fired for Playing Golf During Family Leave

An employee may be lawfully fired for misusing family and medical leave by his activities during leave, including lying about it during subsequent investigations, according to an intermediate appellate court in California. McDaneld v. Eastern Municipal Water District Board, 8 WH Cases 2d 1353 (6/10/03). In the fact pattern of the case, the court found that the plaintiff played golf for several hours on a Monday afternoon of his family leave, on Wednesday he worked on his lawn sprinklers, and on Friday he did not take care of either his father or his wife, whose illness the employer regarded as feigned. The employer also felt that the plaintiff had been untruthful on a number of points during the employer's investigation.





The plaintiff argued that he did not know he was prohibited from golfing and installing sprinklers while caring for his father and he did not know he should return to work immediately once he had stopped caring for his father. He also claimed that he had to care for his pregnant wife but the employer found that not to be true. The plaintiff argued that golfing and installing sprinklers were not activities inconsistent with providing the necessary physical and psychological care to his father, and that the employer did not properly disseminate information about family and medical leave.

The court concludes that the employer's "justifiable conclusion that he had misused leave in other ways and was untruthful allowed the [employer] to terminate him anyway." The judge cites another case involving the undercover surveillance of an employee, where a federal appeals court decided that an employer can fire an employee if the employer has an honest suspicion that the employee has misused his or her leave. The court in that earlier case felt that the employer's suspicions of fraud, even if wrong, were enough to justify the employee's discharge.

In another related case, the U.S. Court of Appeals for the Sixth Circuit has ruled that an employer did not violate FMLA when it fired a worker on FMLA leave after discovering that he had violated the employer's policy by managing his wife's restaurant while he was on leave. Pharakhone v. Nissan, 8 WH Cases 2d 1006 (4/2/03). It was undisputed that the employer had a company policy prohibiting "unauthorized work for personal gain while on leave," and there was no evidence that the employer had an ulterior motive for firing the worker.

Editor's Note - *While the ruling in the McDaneld case is supported by applicable law, such cases are extremely controversial and the ruling could have gone the other way. Advice of counsel in such circumstances is a necessity.*

Genetic Discrimination to be Banned by Congress

Most commentators predict that the newest "protected category" under the federal employment discrimination laws will be a ban against genetic discrimination in employment, a ban that would also apply to health insurers, preventing them from using an individual's genetic information to deny coverage or to determine rates or premiums. The Bush Administration has expressed its strong support for the legislation, and Congress is expected to pass this law this year. In the employment sections of the law, it appears that Republicans have convinced Democrats to limit individuals' rights to sue only to allegations of intentional discrimination by employers, although there is language in the Senate legislation to establish a commission to assess the possibility of "disparate impact" cases, in which plaintiffs could allege unintentional discrimination by employers. Republicans insisted on limiting employers' liability only to intentional discrimination because, they insisted, allegations of disparate impact would force plaintiffs to collect protected genetic information from fellow employees and such information is often considered private. The bill also includes language to protect employers from liability if they unwittingly learn genetic information about employees, termed "the water cooler problem" by negotiators of the bill. That is, if an employer

acquires genetic information with respect to an employee in a conversation about an employee's sick mother at the water cooler, it would not be considered a violation of the law. However, employers who acquire such information would be required to keep it confidential.

Plaintiffs who sue for genetic bias under the bill would be able to seek the same remedies that are available under the Americans with Disabilities Act. Under the ADA, punitive and compensatory damages for individuals are capped at $300,000 and Democrats had pushed for legislation in which plaintiffs could obtain unlimited damages. Workers who sue would still have to file timely EEOC charges, and the law would become effective 18 months after enactment.

The bill defines genetic information as information about a person's genetic tests, a family member's genetic tests, or "the occurrence of a disease or a disorder in family members of the individual." The Senate bill is known as the Genetic Information Non-Discrimination Act (S. 1053). Genetic discrimination is not explicitly addressed in the Americans with Disabilities Act, although discrimination on the basis of a diagnosed predisposition towards an asymptomatic condition or illness may be protected under the law's "regarded as disabled" provision. In a 1995 Policy Guidance, the EEOC has been taking the position that the ADA protects discrimination against employees based on their genetic makeup. Surveys indicate that workers fear that employers will use genetic information to lower their insurance and sick leave costs by weeding out individuals who have traits linked to inherited medical conditions.

It appears that genetic testing is relatively rare in the workplace. A survey by the American Management Association three years ago indicates that only 7% of employers perform genetic tests on employees. However, nearly 16% reported testing for "susceptibility to work place hazards," some of which can be considered genetic testing. In one case brought by the EEOC against Burlington Northern Santa Fe Railroad, the employer in March 2000 on the advice of its medical department began a program whereby some employees who claimed work-related carpal tunnel syndrome were required to take a DNA test for a Chromosome 17 Deletion, a test to predict a genetic proclivity to some forms of carpal tunnel syndrome. In its first court challenge to genetic testing, the EEOC charged that the railroad's practice of requiring employees who have submitted claims of work-related carpal tunnel syndrome to provide blood samples to determine if they might have a genetic propensity to the condition, violated the ADA. The employer subsequently announced that it would stop genetic testing of workers with carpal tunnel syndrome, just days after the EEOC filed suit.

--Perspective--

Do the Affirmative Action Rulings Apply to Employment?

Technically, the U.S. Supreme Court rulings this June on affirmative action in higher education do not apply to the employment setting. Indeed, Justice O'Connor, the swing vote on the cases, seems to emphasize that the Court has a "tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits," and most of the Court's analysis dealt only with the educational setting. Justice O'Connor became the Court's first female justice in 1981, and has long been the swing vote on discrimination rulings. She has generally voted with fellow conservatives in opposing affirmative action on the job, in public contracting and in drawing Congressional voting districts. In the current rulings, however, she suggests that rules on affirmative action should be more flexible when it comes to education.

It is also interesting to note that for many years, it was preached to employers the legal necessity to be "objective" in setting forth employment criteria, and to avoid subjectivity. At least in the case of admission to higher education, however, both opinions eschew objectivity and encourage subjectivity, at least as long as diversity is considered. This distinction was not lost on Justice Ginsburg, who wrote in dissent in the undergraduate case that "if

Wimberly Lawson
Seale Wright & Daves, PLLC
Attorneys & Counselors at Law
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Knoxville, Tennessee 37901-2231

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honesty is the best policy, surely Michigan's accurately described, fully disclosed college affirmative action program is preferable to achieving similar numbers through winks, nods and disguises."

Thus, legal scholars are in general agreement that the lines of cases dealing with affirmative action in education are quite different from those lines of cases dealing with affirmative action in employment, the latter using different approaches. On the other hand, had the Court ruled that affirmative action in education was unlawful, obviously affirmative action as it relates to employment would be at greater legal risk.

There were some unusual alliances in the recent Supreme Court ruling, in which many large employer groups, and military groups, joined with civil rights groups in filing friend of the court briefs encouraging the Court to uphold affirmative action in education. Some say it was this convergence of support to affirmative action that caused Justice O'Connor to play the pivotal role in upholding affirmative action in the law school admission case. Thus, the reaction in most communities to the ruling was supportive. As one commentator stated, the rulings are a good policy, even if not good legal analysis.

This writer believes that debates over affirmative action are truly one of the most complicated issues of our time. It is hard to argue with those on either side of the issue. The writer also notes that he, himself, is possibly a beneficiary of affirmative action, having been admitted to Harvard Law School at a time when that school was known to apply diversity principles to admitting students from different areas of the country. A "country boy from Georgia," therefore had some advantages for admission to Harvard Law School over a "city slicker," from New York City, for example.

Whatever the legal effect, the recent rulings provide additional importance to diversity programs in the employment setting.

Do affirmative action rulings apply to employment?