

ALR Federal

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- _____
- _____
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From the editor

With the current jittery state of the stock markets and, by necessary extension, the many mutual funds dependent on these markets for their performance on behalf of retirement funds, participants in these funds may be inclined to look to the fiduciaries of their retirement plans for explanations as to their selection of investment managers. The upcoming volumes of A.L.R. Fed are particularly rich in discussions of what individuals or other entities are “fiduciaries” within the terms of the Employee Retirement Income Security Act (ERISA), which controls the formation and management of retirement plans. Hopefully, remedies against our plan fiduciaries will never need to be invoked, but it is wise to keep in mind who these “persons” are.

Russell G. Donaldson, J.D.

Highlights

CIVIL RIGHTS

Reverse sex discrimination

A male inmate with long hair is told by prison officials that he must cut his hair. Female inmates in this jurisdiction are not required by prison officials to maintain short hair. After the inmate has his hair cut he files an action against the prison officials for reverse gender discrimination. Following the United States Supreme Court’s decisions in various cases that the constitutional protections of the Fifth and Fourteenth Amendments, and the statutory protections of various federal statutes apply to both males and females alike, a number of actions involving plaintiffs claiming unlawful reverse discrimination against men because of their gender have been pursued. Of course, not all the decisions by various federal and state courts in non-employment situations were decided in favor of those male plaintiffs who initiated them. This annotation collects and analyzes those federal and state cases, in which claims of reverse discrimination on the basis of sex or gender have



been considered in situations other than those involving public and private employment, on the grounds either that such discrimination was violative of the due process or the equal protection rights guaranteed by the Federal Constitution, or that the action involved contravened

specific provisions of various federal civil rights acts. Useful articles on sex discrimination based on sexual stereotyping (53 Am Jur Trials 299) and an individual’s liability for sexual harassment (61 Am Jur Trials 489) are referenced in the Practice Aids section of this annotation. [166 A.L.R.Fed 1](#)

ERISA

Professional as Fiduciary

As attorneys, we all know that we owe certain fiduciary duties to our clients, and, like all fiduciaries, can be held liable for a breach of those duties. Under § 3(21)(A) of the Employee Retirement Income Security Act of 1974 (ERISA) (29 U.S.C.A. § 1002(21)(A)), a person such as an attorney, accountant, actuary, or other

person providing professional services to an ERISA plan may be considered a fiduciary of the plan if the person exercises functional authority, control, or responsibility with respect to the plan or its assets. The decision whether a particular attorney, accountant, or other provider is a fiduciary is therefore based on the facts of the given case. This annotation looks at the general considerations in determining who is a fiduciary under ERISA, as well as whether attorneys, accountants, or other professional service providers were ERISA-fiduciaries under the circumstances presented. The article outline contains sections devoted to whether attorneys, accountants, actuaries, attorneys, appraisers, or arbitrators are fiduciaries, and directs the reader to cases of interest. Check the "Related Annotations" section of the annotation for additional articles covering other aspects of ERISA. [166 A.L.R.Fed 595](#)

EVIDENCE

Evidence—Rape Shield Law

It is no longer true that a rape accusation automatically allows the defendant to bring up whatever gossip the defendant could find on the complainant. Federal Rule of Evidence 412 reflects the now virtually universal view that chastity is irrelevant to the veracity of a witness and that sexual activity has no bearing on the issue of consent. The principal purpose of Federal Rule of Evidence 412 is to protect the privacy of the victims from the degrading and embarrassing disclosure of intimate details about their private lives. This, in turn, encourages the reporting and prosecution of rapes. This annotation collects and discusses those cases in which courts have determined the admissibility, in a sex offense case, under Federal

Rule of Evidence 412, of the victim's past sexual behavior. Check the Practice Aids section for related articles, such as determining preliminary facts under Federal Rule 104 (45 Am Jur Trials 1). [166 A.L.R.Fed 639](#)

FEDERAL TORT CLAIMS ACT

Who is government employee

Can a patient who is the victim of medical malpractice in an army hospital sue the federal government and the physician for any injuries sustained? Prior to 1946, the answer might well have been that the United States, as a sovereign, was immune from suit except where it consented to be sued. In 1946, however, Congress enacted the Federal Tort Claims Act (FTCA), (28 U.S.C.A §§1346(b), 2671 et seq.), which provides for a limited waiver of immunity for tort claims against the United States. The FTCA only waives the United States' sovereign immunity for damages caused by the negligent actions or omissions of federal agencies or any employee of the Government. By definition, a federal agency or employee does not include "any contractor with the United States" such that the United States is not liable under the FTCA for the negligent actions or omissions of its independent contractors. This annotation will examine whether a particular individual or entity is a government employee or independent contractor for purposes of a federal agency's liability under the FTCA. The schematic outline at the front of the annotation will guide you right to the individual or entity in which you are most interested. Don't forget that other articles dealing with different aspects of the FTCA can be found in the Related annotations section of the annotation. [166 A.L.R.Fed 187](#)

Coming Soon

CIVIL RIGHTS

Laws not abridging religious freedom

Although the First Amendment guarantees the right to freely exercise one's religion, this does not mean that all laws that in one manner or another restrict that right are invalid. A test for determining whether particular statutes, rules, or regulations are valid was set forth in *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876, 52 Fair Empl. Prac. Cas. (BNA) 855, 53 Empl. Prac. Dec. (CCH) P 39826, Unempl. Ins. Rep. (CCH) P 21933 (1990), reh'g denied, 496 U.S. 913, 110 S. Ct. 2605, 110 L. Ed. 2d 285 (1990) and on remand to, 310 Or. 376, 799 P.2d 148, 53 Fair



Empl. Prac. Cas. (BNA) 1743 (1990), where the Supreme Court rewrote First Amendment jurisprudence by dispensing with a balancing test in the case of neutral laws of general applicability and holding such laws to represent no free exercise violation. Since the *Smith* case, courts have frequently had occasion to determine whether a particular law was neutral and of general applicability and those cases are collected in this annotation. This annotation deals with the validity of state and federal statutes and regulations dealing with matters ranging from the slaughter of animals to drug laws. The article outline is based on the subject matter of the statute involved and will provide a useful guide for the user. References to

additional annotations dealing with First Amendment rights can be found in the Related annotations section of the annotation. **167 A.L.R. Fed**

CRIMINAL LAW

Drug Transactions-Forfeitures

Late night television provides the viewer with any number of interesting commercials, including ads regarding auctions of personal property seized by the federal government. To find out more on the government's ability to seize personal property used in the illegal manufacture, processing, or sale of controlled substances, check out this annotation, which collects and analyzes those federal court cases that have determined whether probable cause existed to support the forfeiture of items of personal property used in the illegal manufacture, processing, or sale of controlled substances under § 511 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C.A. § 881). Check the Related Annotations section for an annotation dealing with real property as subject of forfeiture under Uniform Controlled Substances Act or similar statutes (86 ALR4th 995). **167 A.L.R.Fed**

CRIMINAL LAW

Interstate transportation of minors

It is not only morally wrong to take a minor across a state line so that she can engage in prostitution, it is also a federal offense. Title 18 U.S.C.A. § 2423, enacted in 1948 and amended as recently as 1998, makes it a criminal offense to transport an individual under age 18 in interstate commerce with intent that the individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense, or to travel in interstate commerce, or conspire to do so, for the purpose of engaging in any sexual act

(as defined in § 2246) with a person under 18 years of age that would be in violation of Chapter 109A. This annotation examines the cases in which the courts have determined the validity of, or construed or applied, this provision. Substantive sections dealing with the admissibility of particular types of evidence in prosecutions under § 2423 can also be found in this annotation. The article outline provides an excellent guide to this important protection for our young persons. **167 A.L.R.Fed**

OCCUPATIONAL SAFETY AND HEALTH

Coal mines

That working in a coal mine, or any mine for that matter, is a dangerous occupation is apparent from the amount of federal legislation on the subject. The Federal Mine Safety and Health Act of 1977 amended and redesignated the statute originally known as the Federal Coal Mine Safety and Health Act of 1969. These amendments included the expansion of the 1969 statute's coverage from "coal mines" to "coal or other mines" and were implemented at the same time as the repeal of the Federal Metal and Nonmetallic Mine Safety Act, formerly 30 U.S.C.A. §§701 et seq., which before 1977 had been the basis for federal regulation of mines other than coal mines. In the 1977 Act, Congress provided a new definition of "coal or other mine" applicable to the safety provisions, but retained the earlier definition of "coal mine" contained in the 1969 statute, formerly 30 U.S.C.A. § 802(h), now 30 U.S.C.A. § 802(h)(2), expressly for the purposes of the Black Lung Benefits Act (30 U.S.C.A. §§ 900 et seq.). This annotation collects decisions of the federal courts, as well as selected opinions of the Federal Mine Safety and Health Review Commission (FMSHRC), which have addressed the issue of what constitutes a "mine" under § 802(h). A list of annotations dealing with other aspects of mines and mining can be found in the Related annotations section of the annotation. **167 A.L.R. Fed**

Index

The following is a complete list, arranged alphabetically by topic, of annotations contained in the current volume 166 or scheduled for publication in volume 167 of A.L.R.Federal. Some of the annotations listed may be rescheduled.



CIVIL RIGHTS

What Constitutes Reasonable Accommodation Under Federal Statutes Protecting Rights of Disabled Individual, as Regards Educational Program

or School Rules as Applied to Learning Disabled Student. **166 A.L.R.Fed 503**

What Constitutes Reverse Sex or Gender Discrimination Against Males Violative of Federal Constitution or

Statutes—Nonemployment Cases. **166 A.L.R.Fed 1**
What Laws Are Neutral and of General Applicability
Within the Meaning of Employment Div., Dept. of
Human Resources of Oregon v. Smith, 494 U.S. 872,
110 S. Ct. 1595, 108 L. Ed. 2d 876. **167 A.L.R. Fed**

CRIMINAL LAW

Admissibility in Sex Offense Case, Under Rule 412 of
Federal Rules of Evidence, of Evidence of Victim's Past
Sexual Behavior. **166 A.L.R.Fed 639**

Validity, Construction, and Application of 18 U.S.C.A.
§ 2423, Making it Criminal Offense to Transport Minor
Across State Line for Sexual Purposes. **167 A.L.R.Fed**

DRUGS AND NARCOTICS

What Constitutes Establishment of Prima Facie Case
for Forfeiture of Personal Property Used in Illegal
Manufacture, Processing, or Sale of Controlled
Substances Under § 511 of Comprehensive Drug
Abuse Prevention and Control Act (21 U.S.C.A.
§ 881). **167 A.L.R. Fed**

ENVIRONMENTAL LAW

Construction and Application of Plant Variety Protec-
tion Act (7 U.S.C.A. §§2321 et seq.). **167 A.L.R. Fed**

ERISA

When Is Attorney, Accountant, or Other Professional
Service Provider a Fiduciary Within Meaning of
§ 3(21)(A)(i) or (iii) of Employee Retirement Income
Security Act of 1974 (29 U.S.C.A. § 1002(21)(A)(i),
(iii)). **166 A.L.R.Fed 595**

When Is Bank or Other Financial Institution a Fidu-
ciary Within Meaning of § 3(21)(A)(i) or (iii) of
Employee Retirement Income Security Act of 1974 (29
U.S.C.A. § 1002(21)(A)(i), (iii)). **166 A.L.R.Fed 671**

When is Individual or Entity a Fiduciary Within
Meaning of § 3(21)(a)(ii) of Employee Retirement
Income Security Act of 1974 (29 U.S.C.A.
§ 1002(21)(A)(ii) Defining "fiduciary" to Include
Paid Investment Advisors. **167 A.L.R. Fed**

EVIDENCE

Admissibility in Sex Offense Case, Under Rule 412 of
Federal Rules of Evidence, of Evidence of Victim's Past
Sexual Behavior. **166 A.L.R.Fed 639**

Sufficiency of Evidence When Evaluating Mental
Impairment in Social Security Disability Case Under
20 C.F.R. § 404.1520a. **166 A.L.R.Fed 361**

FEDERAL TORT CLAIMS ACT

Claims Arising from Governmental Conduct Causing
Damage to Plaintiff's Real Property as within Discre-
tionary Function Exception of Federal Tort Claims Act
[28 U.S.C.A. § 2680(a)]. **167 A.L.R. Fed**

FREEDOM OF INFORMATION ACT

Actions Brought under the Freedom of Information
Act, 5 U.S.C.A. § 552 et seq.—Supreme Court Cases.
167 A.L.R. Fed

LABOR AND EMPLOYMENT

When Is Federal Agency Employee Independent
Contractor, Creating Exception to United States'
Waiver of Immunity under Federal Tort Claims Act, 28
U.S.C.A. § 2671. **166 A.L.R.Fed 187**

Who is Eligible Employee Under § 101(2) of Family
and Medical Leave Act (29 U.S.C.A. § 2611(2)). **166
A.L.R.Fed 569**

OCCUPATIONAL SAFETY AND HEALTH

What is "Mine" under Federal Mine Safety and Health
Act of 1977 (30 U.S.C.A. § 802(h)). **167 A.L.R. Fed**

REMOVAL OF CAUSES

Who Is "Person Acting Under" Officer of United
States or Any Agency Thereof for Purposes of Avail-
ability of Right to Remove State Action to Federal
Court Under 28 U.S.C.A. § 1442(a)(1) **166
A.L.R.Fed 297**

SOCIAL SECURITY

Effect of Administrative Law Judge's Failure to
Explain Rejection of Probative Evidence in Social
Security Disability Case. **167 A.L.R. Fed**

Also included with this volume is the December 2000 Update to the ALR Federal Quick Index.
This pamphlet should be placed next to the bound volume.
The August 2000 Pamphlet should be recycled or discarded.

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