

ALR Federal

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From the editor

Preparing and adjusting to a new school year can be difficult for any student, but imagine how much more difficult the new school year is for a student who has a physical or mental disability. When a student fails a course, is the student a poor student or does this student have a learning disability? If the student does have a learning disability, the school must reasonably accommodate that student. Are the parents of a physically disabled student entitled to damages if they decide to send their child to a private school because they believe that the private school is better able to serve the needs of their child? Volumes 165 and 166 of ALR Federal address these issues and other civil rights issues, such as whether an at-will employee can bring an action for discrimination under 42 U.S.C.A. § 1981, what constitutes a willful violation of the Age Discrimination in Employment Act entitling the victim to liquidated damages, and what constitutes reverse gender discrimination in non-employment actions.

Amy P. Bunk, J.D.

Highlights

TRADEMARK

Famous marks

As we all know, certain trademarks and tradenames become so famous that they almost become generic terms for the particular product or service provided by the owner of the trademark or tradename. These owners have always taken measures to protect their interests, and in 1995 Congress enacted the Federal Trademark Dilution Act, 15 U.S.C.A. §1125(c), which provided a tool that the trademark and tradename owners could use in their fight. Under the Federal Trademark Dilution Act, the owner of a famous mark is entitled, subject to the principles of equity and on such terms as the court deems reasonable, to certain remedies for another person's use in commerce of the mark, if such use begins after the mark has become famous and causes dilution of the distinctive quality of the mark, and if such use is not exempted under the Act. Obviously, the answer to the



question what is a famous mark is of prime importance in determining whether a suit continues or whether it is dismissed for failure to state a cause of action, and this issue is considered in this annotation. The article is organized based on the nature of the product or service involved and will guide you right to the cases in which you are most interested. Check the Research References for additional research and practice aids, including an article in 38 Am Jur Proof of Facts 3d, entitled "Dilution of Trademark," that is especially pertinent. [165 ALR Fed 625](#)

CIVIL RIGHTS

At-will-employee's rights under 42 U.S.C.A. § 1981
 Can an African American who is an at-will employee sue for race discrimination under 42 U.S.C.A. § 1981? Since all persons within the United States are given the same right to make and enforce contracts as is

enjoyed by white citizens under 42 U.S.C.A. § 1981(a), the question has arisen whether an at-will-employee—that is, an employee not covered by an employment contract—may bring an action for racial discrimination under § 1981. The answer to this question may depend on where the individual lives, as, although as a general rule such suits have been allowed, there are district courts in a few circuits that have held that such an action may not be maintained. Those courts that have allowed such actions, as in *Fadeyi v. Planned Parenthood Ass'n of Lubbock, Inc.*, 160 F.3d 1048, 78 Fair Empl. Prac. Cas. (BNA) 675 (5th Cir. 1998), have held that an employee subject to at-will termination under state law nevertheless has a “contract” with the employer, as required to maintain an action under § 1981. These courts generally note that Congress, through the Civil Rights Act of 1991, amended § 1981 to add a broad definition of the phrase “make and enforce contracts,” which includes “the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.” This annotation collects and summarizes those cases in which the courts have determined whether an at-will employee can bring an action for racial discrimination under 42 U.S.C.A. § 1981. [165 ALR Fed 143](#)

LABOR AND EMPLOYMENT

Domestic service provisions of Fair Labor Standards Act

It may be obvious that if you have a house cleaner who comes in twice a week you have a “domestic servant” within the scope of the Fair Labor Standards Act, which was amended in 1974 to include “employees in domestic service” among those protected by its provisions. But what about a baby-sitter employed on a casual basis? What if you have hired a companion for your aged and infirm mother? These and “do-

mestic workers” who reside in their employers’ households are exempt under 29 U.S.C.A. § 213(a)(15), (b)(21) from the provisions of the FLSA, although generally domestic service employees are covered under 29 U.S.C.A. §§ 206(f) and 207(l). The regulations promulgated by the Secretary of Labor clarify many questions of definition, but often the question of coverage must be determined by the courts. This annotation collects and analyzes federal cases construing or discussing the validity of the provisions of the Fair Labor Standards Act regarding employees in “domestic service.” [165 ALR Fed 163](#)

CIVIL RIGHTS

Damages under Individuals with Disabilities Education Act (IDEA)

What if your child is disabled within the meaning of the Individuals with Disabilities Education Act, and consequently entitled to a free public education with all the special educational equipment and training required, but you do not trust the quality of the public schools in your district? Can you opt for monetary damages in an IDEA action and use them to fund a higher-quality education at a private school? The IDEA gives a disabled student an enforceable substantive right to a public education that includes special education and related services designed to meet that student’s unique needs. It aims to ensure that a disabled student receives, at public expense, an education that suits that student’s needs, instead of remaining at home or in an institution without the benefit of educational services. Numerous federal courts have considered whether damages are available for violations of the IDEA. This annotation collects and analyzes those cases in which the federal courts have determined whether damages are generally available for violations of the IDEA and whether the plaintiff in the case at hand was entitled to recover damages. [165 ALR Fed 463](#)

Coming Soon

CIVIL RIGHTS

Reasonable accommodation of learning disabled student

Is a student who is unable to pass high school algebra simply a poor math student, or learning disabled and therefore entitled to certain accommodations under federal law? The answer to this question is addressed in this annotation, which collects and analyzes those cases in which the courts have considered whether a particular requested accommodation—related either to academic requirements or discipline—was required to avoid dis-



criminating against learning disabled students under either the Rehabilitation Act, 29 U.S.C.A. § 794, or the Americans with Disabilities Act (ADA), 42 U.S.C.A. §§ 12101 et seq.. The Rehabilitation Act prohibits discrimination against an “otherwise qualified individual with a disability.”

The ADA similarly provides that a “qualified individual” with a disability may not be excluded from participation in or be denied the benefits of the services of a public entity or a place of public accommodation, i.e., a private school. Both public and private schools thus must provide “reasonable accom-

modations” to learning disabled students, when requested, or make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability. The article is organized based on the particular accommodation requested—extra time for testing, a particular instructor, etc.—and will guide you right to the cases in which you are most interested. For a related annotation, see 161 ALR Fed 1: “What constitutes services that must be provided by federally assisted schools under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C.A. secs. 1400 et seq.)” **166 ALR Fed**

REMOVAL OF CAUSES

Who is person acting under officer of the United States

The statute commonly known as the federal officer removal statute (28 U.S.C.A. § 1442(a)(1)) grants the right to remove actions from state court to federal court to “the United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, sued in an official or individual capacity for any act under color of such office. . . .” This annotation focuses on those who attempt to remove as a “person acting under” a federal officer or agency. While most courts construing this provision have held that corporations can be “persons” within the meaning of the statute, the phrase “acting under” has generally been construed to mean that there must be some federal directives of particular detail that relate to the conduct for which the person seeking to remove is being sued in state court. Inasmuch as the question whether one is “acting under” a federal officers turns on the facts of the particular case, it is not surprising that there has been a fair amount of litigation involving the interpretation of this phrase. After discussing such matters as the inclusion of corporations and the general definition of “acting under,” the annotation turns to a discussion of the availability of removal to particular defendants. Consult the article outline to locate the cases that are of most pertinent to you, and check the annotation summary for a concise, easy-to-read overview of this topic. **166 ALR Fed**

LABOR AND EMPLOYMENT

Who is eligible employee under FMLA

Not too long ago, a parent whose child became seriously ill had to choose between being with their child or leaving the child each day to go to work and thereby in some cases maintain the health insurance that was providing funds for the child’s care, but a federal law

now entitles many workers to take up to 12 weeks of unpaid leave to care for a sick parent or child. This statute is the Family and Medical Leave Act (FMLA) (29 U.S.C.A. §§2601 et seq.). The FMLA does not, however, extend to all employees, and among the fundamental questions that must be answered—and the question that is studied in this article—is whether the party seeking to enforce rights under the FMLA is an “eligible employee” to whom the Act applies. Obviously, if the person is not an eligible employee, the action will end right there. Generally, the term “eligible employee” means an employee who has been employed for at least 12 months by the employer with respect to whom leave is requested and for at least 1,250 hours of service with the employer during the previous 12-month period, but does not include employees who are employed at a worksite at which the employer employs less than 50 employees if the total number of employees employed by that employer within 75 miles of that worksite is less than 50. While there is a tremendous amount of jurisprudence involving the Family and Medical Leave Act as a whole, as can be seen from this definition, a fair amount of the litigation has centered on whether a particular employee has rights under the Act. This article has collected those cases for you and organized them in a way that will allow you to immediately find the cases that are most pertinent to you. **166 ALR Fed**

BANKS

When is a bank a fiduciary under ERISA

Since banks have a certain amount of control over most of our money, we certainly hope that banks owe us certain duties of good faith and fair dealing. The question often arises whether a bank that is a repository of ERISA funds serves as a fiduciary subject to ERISA. Under § 3(21)(A) of the Employee Retirement Income Security Act of 1974 (ERISA) (29 U.S.C.A. § 1002(21)(A)), a bank or other financial institution may be considered a fiduciary of an ERISA plan to the extent that it exercises functional authority, control, or responsibility with respect to the plan or its assets. The decision whether a particular bank or financial institution 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 banks or like financial institutions were ERISA fiduciaries under the circumstances presented. The article contains sections devoted to whether banks acting in certain capacities were fiduciaries when so acting and will direct you right to the cases in which you are most interested. Check the “Related annotations” section of the annotation for additional articles covering other aspects of ERISA. **166 ALR Fed**

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The following is a complete list, arranged alphabetically by topic, of annotations contained in the current volume 165 or scheduled for publication in volume 166 of ALR Federal. Some of the annotations listed may be rescheduled.



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