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Legal Summaries

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Legal Summaries*

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UNITED STATES SUPREME COURT

Alaska Dep't of Envtl. Conservation, 124 S. Ct. 983 (2004).

LAW: The EPA has authority to stop construction of a major pollutant emitting facility permitted by a state authority when it finds that the authority's best available control technology is unreasonable.

FACTS: The Clean Air Act's ("CAA") Prevention of Significant Deterioration ("PSD") program was designed to ensure that the air quality in "attainment areas" (areas that are already "clean") will not degrade. The program bars construction of any major air pollutant emitting facility not equipped with "the best available control technology" ("BACT"). The Environmental Protection Agency ("EPA") has enforcement authority, when it finds that a State is not complying with a CAA "requirement" governing construction of a pollutant source, to pursue remedial action, including "an order prohibiting construction." Because northwest Alaska has been classified as an attainment area for nitrogen dioxide, the PSD program applies to the emissions of that pollutant in the region, requiring a permit to construct a facility emitting said pollutant. A permit will not be issued unless the proposed facility is subject to BACT for each CAA-regulated pollutant emitted from the facility. Teck Cominco Alaska, Inc. ("Cominco") operated a zinc concentrate mine in northwest Alaska and sought to expand its zinc production. Cominco applied to the Alaska Department of Environmental Conservation ("ADEC") for a PSD permit for its generators. ADEC preliminarily proposed as BACT an emission control technology known as selective catalytic reduction ("SCR"), which reduced emissions by 90%. Amending its application, Cominco proposed, as BACT, an alternative control technology, Low NOx, that achieves a 30% reduction in pollutants. ADEC thereafter issued a first draft PSD permit concluding that Low NOx was BACT for the generators. ADEC identified SCR as the most stringent technology then technically and economically feasible, but still endorsed Cominco's proffered emissions-offsetting alternative. ADEC concluded that this proposal would achieve similar emission reduction results as SCR. The EPA objected that ADEC had identified SCR as the BACT,

but failed to require it as BACT. ADEC responded with a second draft PSD permit, again finding Low NOx to be BACT. ADEC further conceded that, lacking data from Cominco, it could make no judgment as to SCR's impact on the mine's operation, profitability, and competitiveness, but that it did impose a "disproportionate cost" on the mine. In rejecting the EPA's suggestion that ADEC include an analysis of SCR's adverse economic impacts on Cominco, ADEC issued a final permit approving Low NOx as BACT, citing SCR's adverse effect on the mine's unique and continuing impact on the region's economic diversity and the venture's "world competitiveness" as justification for issuing the permit. The EPA then issued three orders to the EPA prohibiting it from issuing a PSD permit to Cominco without satisfactorily documenting why SCR was not BACT. Additionally, the EPA prohibited Cominco from beginning construction or modification activities at the mine. The Ninth Circuit rejected challenges from ADEC and Cominco, holding that the EPA had authority to determine the reasonableness or adequacy of the State's justification for its BACT decision since Cominco failed to demonstrate SCR's economic infeasibility and ADEC failed to provide a reasoned justification for its elimination of SCR as a control option.

ANALYSIS: The Clean Air Act enumerates several preconstruction requirements for the PSD program, including a BACT determination. Absent this determination, no major emitting facility may be constructed. The CAA construction the EPA advances in this litigation is consistent with prior interpretive guides the Agency has several times published. "Only when a state agency's BACT determination is 'not based on a reasoned analysis' may EPA step in to ensure that the statutory requirements are honored." Since the CAA itself does not specify a standard for judicial review in this instance, the Court deferred to the default standard in the APA of whether the action was "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." The Court hinged on the issue of whether ADEC's BACT determination was reasonable. Since the EPA was willing to consider "an appropriate record" by ADEC, supporting its selection of NOx and detailing the adverse economic impacts upon Cominco, the decision to issue prohibitory orders until such record

was submitted was within the EPA's reasonable discretion in its supervisory role over the state authority's BACT determinations.

HOLDING: The CAA authorized the EPA to stop construction of a major pollutant emitting facility permitted by a state authority when the EPA finds that an authority's BACT determination is unreasonable. The judgment of the Ninth Circuit Court of Appeals was affirmed.

IMPACT: This is a very important ruling because it deals with administrative law on both the state and federal levels. The Court narrowed the discretion given to state agencies when making BACT determinations. Because of this ruling, these state agencies must now give detailed reports as to why a certain BACT was chosen, including the economic and environmental impacts; otherwise, the EPA will be able to circumvent any decision the state agency makes as unreasonable and withhold the permit. On the other hand, this decision afforded great discretion to the EPA in determining the reasonableness of the actions by the state agencies.

Frew ex rel. Frew v. Hawkins, 124 S. Ct. 899 (2004).

LAW: Enforcement of a consent decree entered into by a state is enforceable by a federal court.

FACTS: As a participant in the Medicaid program, Texas must meet certain federal requirements, including that it have an Early and Periodic Screening, Diagnosis and Treatment ("EPSDT") program for children. The petitioners, mothers of children eligible for EPSDT services in Texas, sought injunctive relief against state agencies and various state officials, claiming that the Texas program did not meet federal requirements. The claims against the state agencies were dismissed on Eleventh Amendment grounds, but the state officials remained in the suit and entered into a consent decree approved by the federal district court. In contrast with the federal statute's brief and general mandate, the decree required state officials to implement many specific proposals. Two years later, when the petitioners filed an enforcement action, the district court rejected the state officials' argument that the Eleventh Amendment rendered the decree unenforceable, found violations

of the decree, and directed the parties to submit proposals outlining possible remedies. On interlocutory appeal, the Fifth Circuit reversed, holding that the Eleventh Amendment prevented enforcement of the decree because the violations of the decree did not also constitute violations of the Medicaid Act. The issue presented was whether enforcement of the consent decree would violate the Eleventh Amendment by circumventing its protections and undermining sovereign interests and accountability of state governments.

ANALYSIS: The Court reasoned that enforcing the decree vindicates an agreement that the state officials reached to comply with federal law. Federal courts are not reduced to approving consent decrees and hoping for compliance. Once entered, that decree may be enforced. Further, if a detailed order is required to ensure regulatory compliance with a decree for prospective relief that in effect mandates the state to administer a significant federal program, federalism principles require that state officials with front-line responsibility for the program be given latitude and substantial discretion. The federal court must ensure that when the decree's objects have been attained, responsibility for discharging the state's obligations is returned promptly to the state and its officials. The basic obligations of federal law may remain the same, but the precise manner of their discharge may not. If the state establishes reason to modify the decree, the court should make the necessary changes; otherwise, the decree should be enforced according to its terms.

HOLDING: The judgment holding that the consent decree was unenforceable against the state officials was reversed, and the case was remanded for further proceedings.

IMPACT: The Supreme Court expanded the lower federal courts' power to enforce consent decrees made by states to comply with federal regulatory requirements.

Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP, 124 S. Ct. 872 (2004).

LAW: When a telecommunications company refuses to deal with its competitors, Sherman Act liability should only be imposed in

exceptional circumstances, as the actions taken by the overseeing regulatory agencies will generally be sufficient to deter such conduct.

FACTS: The Telecommunications Act of 1996 imposes upon an incumbent local exchange carrier ("LEC") the obligation to share its telephone network with competitors, including the duty to provide access to individual network elements on an "unbundled" basis. New entrants, so-called competitive LECs, combine and resell these unbundled network elements ("UNEs"). Petitioner Verizon Communications, Inc., the incumbent LEC in New York, has signed interconnection agreements with rivals such as AT&T, detailing the terms on which it will make its network elements available. Part of Verizon's statutory UNE obligation is the provision of access to operations support systems ("OSS"), without which a rival cannot fill its customers' orders. Verizon's interconnection agreement, approved by the New York Public Service Commission ("PSC"), and its authorization to provide long-distance service, approved by the Federal Communications Commission ("FCC"), each specified the mechanics by which its OSS obligation would be met. When competitive LECs complained that Verizon was violating that obligation, the PSC and the FCC opened parallel investigations, which led to the imposition of financial penalties, remediation measures, and additional reporting requirements on Verizon. Respondent, a local telephone service customer of AT&T, then filed this class action alleging that Verizon had filled rivals' orders on a discriminatory basis as part of an anticompetitive scheme to discourage customers from becoming or remaining customers of competitive LECs in violation of the Sherman Act. The District Court dismissed the complaint, concluding that respondent's allegations of deficient assistance to rivals failed to satisfy Sherman Act requirements. The Second Circuit reinstated the antitrust claim. The issue presented to the Supreme Court is whether Respondent's complaint states a claim under the Sherman Act.

ANALYSIS: The activity of which respondent complains does not violate pre-existing antitrust standards. The Court distinguishes the instant case from *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 427 U.S. 585 (1985), the leading case on the issue of imposing antitrust liability for refusal to deal with

competitors. The Court reasons that *Aspen* carves out a limited exception, one in which the instant case does not fall. Because the complaint does not allege that Verizon ever engaged in a voluntary course of dealing with its rivals, its prior conduct sheds no light upon whether its lapses from the legally compelled dealing were anticompetitive. Further, Verizon's reluctance to interconnect at the cost-based rate of compensation available under the statute is uninformative with respect to any alleged monopolistic retail price. Moreover, in *Aspen*, the defendant refused to provide its competitor with a product it already sold at retail; whereas, Verizon provides the unbundled elements to rivals under compulsion and at considerable expense. These unbundled elements are not even available to the public. The Court holds to the general proposition that there is no duty to aid competitors. When there exists a regulatory structure designed to deter and remedy anticompetitive harm, the additional benefit to competition provided by antitrust enforcement will tend to be small, and it will be less plausible that the antitrust laws contemplate such additional scrutiny. Since Verizon was subject to oversight by the FCC and the PSC, both of which agencies responded to the OSS failure raised in respondent's complaint by imposing fines and other burdens on Verizon, there is no need to apply Sherman Act requirements to this regime. To do so would create undue burdens on the system and could chill the very conduct antitrust laws are designed to protect.

HOLDING: Respondent's complaint alleging breach of an incumbent LEC's 1996 Act duty to share its network with competitors did not state a claim under § 2 of the Sherman Act.

IMPACT: The Supreme Court confined the possible penalties that could be imposed for a regulatory violation to those rendered by the overseeing regulatory agency.

Securities and Exchange Comm'n v. Edwards, 124 S. Ct. 892 (2004).

LAW: An investment scheme promising a fixed rate of return can be an "investment contract" and thus a "security" subject to the federal securities laws.

FACTS: Edwards was the chairman, CEO and sole shareholder of ETS Payphones, Inc., which sold payphones to the public via independent distributors. The payphones were offered with an agreement under which ETS leased back the payphone from the purchaser for a fixed monthly payment, thereby giving purchasers a fixed 14% annual return on their investment. Although ETS' marketing materials trumpeted the "incomparable pay phone" as "an exciting business opportunity," the payphones did not generate enough revenue for ETS to make the payments required by the leaseback agreements, so the company depended on funds from new investors to meet its obligations. After ETS filed for bankruptcy protection, the Securities and Exchange Commission (SEC) brought a civil enforcement action, alleging that Edwards and ETS had violated registration requirements and antifraud provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934, and Rule 10b-5 thereunder. The district court concluded that the sale-and-leaseback arrangement was an "investment contract" within the meaning of, and therefore subject to, the federal securities laws. The Eleventh Circuit reversed, holding (1) that Eleventh Circuit precedent requires an "investment contract" to offer either capital appreciation or a participation in an enterprise's earnings, and thus exclude schemes offering a fixed rate of return; and (2) those precedential opinions' requirement that the return on the investment be derived solely from the efforts of others was not satisfied when the purchasers had a contractual entitlement to the return.

ANALYSIS: The Supreme Court had previously established that the test for determining whether a particular scheme is an investment contract is "whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others." The Court reasoned that this definition is flexible, capable of adaptation to meet the countless and variable schemes devised by those seeking to use others' money on the promise of profits. Therefore, there is no reason to distinguish between promises of fixed return and promises of variable returns for purposes of the test. In both cases, the investing public is attracted by representations of investment income. Moreover, investments pitched as low risk, offering a guaranteed fixed return, are particularly more attractive to individuals who are more vulnerable to investment fraud. In distinguishing between the

types of return for the purposes of the test, such a reading of the statute would allow for unscrupulous marketers of investments to evade the securities laws by picking a rate of return to promise. This interpretation would undermine the purposes of the laws. The fact that investors have bargained for a return on their investment does not preclude federal securities laws from governing.

HOLDING: The Eleventh Circuit erred in its holding that the investment scheme fell outside the definition of "investment contract" because purchasers had a contractual entitlement of return. Such a holding was inconsistent with the Court's prior precedent. Reversed and remanded.

IMPACT: The Court affirmed the SEC's prior treatment of investment contracts and broadened the scope of protection that securities laws afford investors.

UNITED STATES COURT OF APPEALS, DISTRICT OF COLUMBIA CIRCUIT

Communities Against Runway Expansion, Inc. v. Fed. Aviation Admin., 355 F.3d 678 (D.C. Cir. 2004).

LAW: (1) The FAA has discretion to choose any contractor to prepare an environmental impact statement, so long as the objectivity and integrity of the process is not compromised. (2) The "arbitrary and capricious" standard is proper for the review of an environmental justice analysis issued with an environmental impact statement.

FACTS: Boston's Logan International Airport is consistently ranked as one of the worst airports in the country with respect to departure and arrival delays. Because of this ever-growing problem, the Massachusetts Port Authority ("Massport") and the Federal Aviation Administration ("FAA") began investigating different options to alleviate the congestion and delays. Massport and the FAA initiated the environmental review process required under federal and state laws to assess the impacts of different options. Because the state and federal obligations were similar, the two agencies agreed to prepare a joint environmental impact statement ("EIS"). Massport contracted with the consulting firm

of Simat, Helliesen & Eichner, Inc. to prepare the EIS. Massport and the FAA subsequently issued a draft preliminary EIS for public review and comment, which after addressing certain public concerns was later amended and a final report was issued. The final report endorsed what was called the "Preferred Alternative," which called for the construction of Runway 14/32 and the Centerfield Taxiway, as well as improvements to certain existing taxiways. The final environmental impact statement ("FEIS") predicted the Preferred Alternative would reduce delays by as much as 28%, in addition to reducing the number of people exposed to the highest levels of noise relative to other alternatives, but would slightly increase that exposure under one potential scenario. The FEIS also included an "environmental justice" analysis ("EJA"), which concluded that any increase in significant noise exposure would not be disproportionately borne by low-income or minority populations. The FAA approved the Preferred Alternative plan, determining that the project was reasonably consistent with local land-use plans, and that fair consideration had been given to the interests of local communities, as required by law. Communities Against Runway Expansion ("CARE") filed a petition for review of this decision and the City of Boston ("Boston") intervened in support of CARE. Massport intervened in support of the FAA.

ANALYSIS: CARE argued on appeal that SH&E should not have been selected as the contractor, as it had a potential conflict of interest. The court determined that even if, *arguendo*, the FAA failed to properly discharge its duties, CARE would not be entitled to relief since any "error in the selection of the contractor 'did not compromise the objectivity and integrity of the process.'" Further, CARE identified no conflict of interest that would disqualify SH&E from preparing the EIS, nor is there evidence in the record to support such a contention. Boston asserts on appeal that the FAA's EJA is arbitrary and capricious because its choice of the "comparison population" (the population of the potentially affected area) is unreasonable. Boston argues that using Suffolk County as the basis for comparison improperly biased the analysis and that the greater Boston metropolitan area–Logan's "core service area"–should have been used. Even though the EJA was issued by the FAA pursuant to both an Executive Order and a Department of Transportation Order, the court concluded that the

FAA used its discretion to include the analysis in its report and therefore the "arbitrary and capricious" standard should be applied. Under this standard, the court determined that Boston's claim failed on the merits, as the FAA's methodology was reasonable and adequately explained. The FEIS sought to compare the demographics of the population predicted to be affected by any increased noise resulting from the project to the demographics of the population that otherwise might conceivable by affected by noise from the airport. It would be unreasonable to include the entire metropolitan area because noise impacts are limited to the vicinity of the airport.

HOLDING: The court concluded that (1) even assuming the FAA erred in selecting the contractor who prepared the EIS, it was not a ground for relief, and (2) the EJA included in EIS was not arbitrary or capricious in failing to include the entire metropolitan area.

IMPACT: This decision affirmed the broad discretion the FAA possesses with respect to issuing environmental impact statements and environmental justice analyses. So long as said reports are not created in an arbitrary and capricious manner, they will be upheld.

UNITED STATES DISTRICT COURT, DISTRICT OF COLUMBIA

Bobreski v. U.S. EPA, 284 F. Supp. 2d 67 (D.D.C. 2003).

LAW: An ALJ does not have subpoena authority and the EPA can bar its employees from testifying in administrative hearings, as long as that denial is not arbitrary and capricious.

FACTS: Plaintiff Bobreski worked as a technician at Blue Plains wastewater treatment facility ("Blue Plains"), which was run by the District of Columbia Water and Sewer Authority ("WASA"). The plaintiff contacted the Washington Post to report alarming deficiencies in Blue Plains' chlorine alarm system. The resulting article prompted a visit from the Environmental Protection Agency ("EPA") inspector. The plaintiff lost his job, and subsequently filed for federal whistleblower protection and won. After WASA appealed the matter to an administrative law judge ("ALJ"), both parties requested that the inspector testify, and the ALJ issued a

subpoena for the testimony. The EPA refused to allow the inspector to testify and the plaintiff appealed, claiming that such refusal is a violation of the Administrative Procedure Act ("APA").

ANALYSIS: The district court determined that because Congress does not explicitly grant the Secretary of Labor subpoena authority in the six statutes that make up the basis for plaintiff's whistleblower claim, such power does not even impliedly exist. Most of the six statutes contain some form of subpoena authority listed elsewhere in the same legislation; therefore, Congress' omission appears to be intentional. Further, the court reasoned that since the EPA gave valid reasons for its refusal to let the inspector testify, its decision was not arbitrary and capricious. The reasons EPA were in line with the express purpose of its *Touhy* regulations, which set forth procedures when an EPA employee is requested or subpoenaed to provide testimony concerning information acquired in the course of performing official duties. The EPA's reasoning included that allowing the inspector to testify would (1) "be incongruent with the notion of impartiality as contemplated by the regulation"; (2) have a potential cumulative effect, where the EPA would find itself "caught in a morass of actions"; (3) "thwart EPA's efforts to ensure that employees' official time is used only for official purposes, as 'EPA simply does not have sufficient personnel both to carry out its mission and simultaneously allow testimony in the action'"; and (4) be redundant in that the EPA already instructs "the inspector's affidavit to provide an official record of his inspection and subsequent findings regarding Blue Plains, giving the parties 'a consistent record of [the] inspection activities.'"

HOLDING: Because the EPA made a rational decision in accordance with its *Touhy* regulations, the court determined that the EPA's denial of the plaintiff's request for the inspector's testimony was not arbitrary or capricious.

IMPACT: This decision prevents administrative agencies from being burdened by time consuming litigation proceedings of third party witnesses. So long as the agency's refusal to permit their employees from testifying is not arbitrary and capricious, the agency cannot be compelled to get involved.

ALASKA STATE COURT

Raad v. State Comm'n for Human Rights, 2004 WL 103573 (Alaska. Jan. 9, 2004).

LAW: When a hearing examiner reviews the state's reasons for not hiring someone, he must consider whether those reasons were pretextual.

FACTS: Plaintiff teacher was a Muslim of Lebanese descent. When she first applied to teach at a public school, she was determined to be ineligible for a position because of a prior disciplinary action. She later entered the administrative offices, accused the district of discriminating against her, and allegedly made threats. As a result, she was suspended from the applicant pool. The teacher continued to apply for teaching positions, but was not hired. She brought suit against defendant school district, alleging violations of discrimination and unlawful retaliation. The Alaska State Commission for Human Rights dismissed her complaint, and the Superior Court of the State of Alaska affirmed the Commission's dismissal. The teacher appealed.

ANALYSIS: The appellate court employed the three-part *McDonnell Douglas* test to determine whether the teacher was the subject of unlawful discrimination. The teacher was a member of protected classes and she was at least minimally qualified for each teaching position for which she applied. The appellate court accepted that the teacher established a prima facie case and further concluded that a review of the record confirmed that substantial evidence justified the hearing examiner's conclusion that the school district offered legitimate, non-discriminatory, and non-retaliatory reasons for not hiring the teacher for twenty-eight positions. The hearing examiner's conclusion that there was no pretext, however, was problematic because it is not clear how he analyzed the issue of pretext. Similarly, it is not clear what evidence the hearing examiner considered relevant to the pretext issue. The teacher identified instances permitting an inference that some of the district's proffered reasons for not hiring her were pretextual. Therefore, to the extent that that the hearing examiner

found no evidence of pretext, the court determined that finding to be erroneous.

HOLDING: Because there was some evidence of pretext, the court reversed the decision and remanded the matter for further proceedings.

IMPACT: This decision requires state employers to be able to adequately justify their hiring decisions so as not to discriminate. If there is any evidence of a pretext in that decision, the claim will likely withstand a motion to dismiss.

CALIFORNIA STATE COURT

Bonnell v. Med. Bd. of Cal., 82 P.3d 740 (2003).

LAW: Section 11521(a) of the Administrative Procedure Act ("APA") is unambiguous and allows a maximum 10-day stay for agency review of a previously filed petition for reconsideration.

FACTS: The Attorney General, representing the Medical Board of California ("the Board"), filed charges of gross negligence, repeated negligent acts, and incompetence against Dr. Harry Bonnell in connection with two autopsies he performed while serving as chief deputy medical examiner for San Diego County. At the hearing, the administrative law judge ("ALJ") recommended that the Board's accusations be dismissed. The Board subsequently adopted the ALJ's recommendation. Two days before the effective date of the decision, the Attorney General filed a petition for reconsideration. The next day, the Attorney General filed a request pursuant to Government Code section 11521(a), part of the APA, for a stay of the Board's decision to review the petition. The Board granted a 28-day stay solely for the purpose of reviewing the petition. Bonnell then filed a petition for writ of administrative mandate in the superior court. While that petition was pending, the Board granted the Attorney General's petition for reconsideration. The next day, the trial court issued an alternative writ of mandate ordering the Board to set aside the stay or to show cause why it should not be set aside. The trial court found that section 11521(a) allowed the Board to grant only a

maximum 10-day stay to review an already filed petition, and that the Board's order for reconsideration was therefore void for lack of jurisdiction. The Court of Appeals reversed.

ANALYSIS: The court refused to give deference to the administrative agency's prior interpretation of § 11521(a) because it is "clearly erroneous." Although the Board had previously interpreted the statute to allow a maximum 30-day stay for evaluating already filed petitions, the Supreme Court refused to accord any deference to that reading of § 11521(a). Since § 11521(a) is not a regulation promulgated by the Board, but a legislative enactment applicable to a wide range of administrative agencies, the court is less inclined to defer to an agency's interpretation of the statute. The court found that § 11521(a) is unambiguous and allows a maximum 10-day stay for agency review of an already filed petition for reconsideration. As a result, the Board's decision to order a reconsideration is void for lack of jurisdiction.

HOLDING: Since the Board's decision was void for lack of jurisdiction, the judgment of the Court of Appeals was reversed.

IMPACT: This decision clears up any ambiguity in case law as to the maximum stay period allowed by the APA. Further, it reaffirms the notion that courts should only give deference to agency interpretations of rules and statutes in which they have particular expertise in interpreting.

FLORIDA STATE COURT

NAACP v. Fla. Bd. of Regents, 863 So. 2d 294 (Fla. 2003)

LAW: In order to satisfy the standing requirement to challenge a rule change, an organization must show only that there would be a substantial effect on a significant number of its members.

FACTS: The NAACP filed a rule challenge under Florida's Administrative Code to amendments made concerning admissions to the state university system. At issue was the certified question of whether the NAACP has standing to challenge amendments adopted by the Board of Regents and approved by the State Board

of Education. These amendments were made in response to an executive order of the governor that use of racial or gender preference or quotas in admissions be prohibited. The NAACP claimed that its membership included a large number of middle school, high school and university students who would be affected by the change in policy.

ANALYSIS: The court reasoned that since the NAACP correctly asserted that a substantial number of its members were prospective applicants to the state university system, and would be affected by any change in policy concerning minority admissions, the NAACP had standing. The only required showing was that on the rule change would substantially affect a significant number of the NAACP's members. Further, while not specifically identifying its student members as current applicants to the university system, the NAACP demonstrated a sufficient impact on its student members as genuine prospective candidates for admission to meet the requirement of substantial impact. The court found there to be an obvious impact on NAACP's members that is different from the impact of all citizens. The added "boost" that would be taken away from minority students by changing the admission standards and policies undeniably impacted minority students differently than non-minority students and, thus, provides standing to the NAACP.

HOLDING: The certified question was answered in the affirmative, and the court of appeals decision was quashed.

IMPACT: This decision somewhat relaxes the associational standing requirement to challenge rule changes in Florida.

KENTUCKY STATE COURT

Rapier v. Philpot, 2004 WL 102199 (Ky).

LAW: Evidence gleaned from hearsay sources can be enough to satisfy the substantial evidence test so long as it has an "indicia of reliability" and there is a sound basis for the hearing officer's decision.

FACTS: Philpot had worked for the Tourism Development Cabinet ("Tourism Cabinet") for several years prior to being dismissed for misconduct related to his work. Because he was classified as an employee with status, he could only be dismissed for cause, according to Kentucky administrative law. Philpot appealed his dismissal, and an administrative hearing was conducted. Based on his findings that Philpot was guilty of improper work performance, misuse of state property, lying to a supervisor, poor management due to sexual relations with subordinates, and improper use of a state vehicle, the hearing officer concluded that Philpot violated a Kentucky statute. The hearing officer recommended that Philpot be dismissed. The Personnel Board adopted most of the hearing officer's recommendations; Philpot subsequently appealed the Personnel Board's final order. The Franklin Circuit Court dismissed the petition for lack of jurisdiction, finding that since Philpot did not file exceptions to the hearing officer's recommended order, he had failed to exhaust his administrative remedies. Philpot appealed this dismissal to the court of appeals, which held that filing exceptions was not an administrative remedy and, therefore, reversed the trial court.

ANALYSIS: The Supreme Court of Kentucky reasoned that although the trial court did not lack jurisdiction to hear the appeal, the dismissal was proper as there was no cognizable claim that the employee could raise on judicial review. The filing of exceptions was not a prerequisite to obtaining administrative review of a hearing officer's recommended order. However, due to Philpot's failure to file exceptions, Philpot could only raise on judicial review those issues in the agency head's final order that differed from those in the recommended order. As Philpot did not did not seek judicial review of anything in the final order that differed from the recommended order, there were no issues before the trial court.

HOLDING: Because there were no issues before the trial court, its dismissal was proper. The intermediate court is reversed.

IMPACT: This decision is important because it holds that filing exceptions to a hearing officer's report is not an administrative remedy and therefore does not have to be exhausted prior to

appealing. However, if the petitioner fails to file exceptions at the administrative hearing level, he has waived his right to appeal those issues.