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Welcome to e-News: From the Labor, Employment and Benefits Group of Robinson & Cole

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Worker Cannot Force Employer to Erect Crèche

In Spohn v. West (10/2/2000) the U.S. District Court for the Southern District of New York dismissed claims by Julius Spohn, an employee of the Manhattan VA Hospital, that the hospital violated his rights by displaying Jewish symbols but not a crèche during the holiday season. Spohn, who is Catholic, claimed that the hospital purchased a menorah with government funds and placed the menorah in the hospital lobby along with "Happy Hanukkah" signs. The menorah and Hanukkah signs were displayed along with toy soldiers, Christmas trees, Santa Clauses, posters celebrating Kwanzaa and signs announcing Muslim prayer services. Spohn claimed that the hospital's display of Jewish symbols and failure to erect a crèche violated the Establishment Clause of the First Amendment of the U.S. Constitution and created a religiously hostile work environment in violation of Title VII.

After reviewing U.S. Supreme Court decisions, the court dismissed the claims because Spohn failed to show that placing holiday symbols in the lobby would lead a reasonable person to view them as a governmental endorsement of Judaism. The court explained that,

although the hospital may not be prohibited from displaying the crèche in addition to the menorah and other symbols, there is no requirement that the hospital must erect a crèche. The court also dismissed Spohn's Title VII claims finding that, as a matter of public policy, there can be no hostile work environment where the holiday display does not run afoul of the U.S. Constitution and where Spohn could not demonstrate any adverse employment action.

EEOC Concludes that Health Plans Failing to Offer Insurance Coverage for Contraceptives Violates Title VII

The EEOC issued a Decision (12/13/2000) ruling that health plans that exclude prescription coverage for contraceptives violate Title VII, as amended by the Pregnancy Discrimination Act. The PDA prohibits discrimination on the basis of pregnancy and requires equal treatment of men and women in employment, including the provision of fringe benefits. The EEOC also issued a Question and Answer document explaining the decision.

The health plans defended primarily on the grounds that their plans were not gender specific and that their plans covered treatment of medical conditions only where there were abnormalities with the employee's mental or physical health. However, the EEOC determined that the plans had the effect of excluding women from coverage because prescription contraceptives were available only to women. The EEOC rejected the plans' contention that they only covered abnormalities. The plans covered surgical forms of sterilization, such as vasectomies and tubal ligations, and covered numerous treatments designed to maintain health aside from any abnormalities, such as vaccinations. As a result, the EEOC ordered that the health plans "cover the expenses of prescriptive contraceptives to the same extent, and on the same terms," as they cover the expenses of other treatments. In addition, the health plans must offer "the same coverage for conception-related outpatient services" as are offered for other outpatient services. Finally, the EEOC ordered that coverage "must extend to the full range of prescription contraceptive choices."

No Violation of FMLA Where Employee Failed to Give Notice

Reginald Gilliam, a UPS courier, left work with permission from his supervisor to be with his fiancé following the birth of their child. Although Gilliam knew about the pregnancy, he failed to request leave from UPS until the day after the birth. He told his supervisor he would return in a couple of days; however, he failed to contact UPS for a week. UPS terminated Gilliam for job abandonment.

Gilliam filed a claim under the Family and Medical Leave Act asserting that he was entitled to remain on leave to care for his fiancé and newborn baby and that his job should have been held open for his return. In Gilliam v. United Parcel Service, Inc. (11/29/2000) the U.S. Court of Appeals for the Seventh Circuit held that the FMLA does not provide for leave on short notice when longer notice readily could have been given. The court pointed

but that the FMLA regulations issued by the Department of Labor expressly provide that thirty days notice is required for an expected birth. The court also held that the FMLA does not authorize employees on leave to keep silent about when they will return to work.

ADA Does Not Require Shuffling Job Responsibilities to Create a New Position

Jack Jay worked for Intermet Wagner, Inc. as a millwright, repairing and maintaining equipment. The equipment was located high in the plant, requiring millwrights to climb stairs or ladders to reach it. In 1992, Jay tore his Achilles tendon. Following surgery and a six-month leave, he returned to work temporarily as an inspector, a job that did not require climbing. In 1993, Jay reinjured his Achilles tendon and, following therapy, returned to work as a temporary inspector. Jay's doctors imposed permanent work restrictions, prohibiting Jay from climbing and working in high areas. The company placed Jay on a medical layoff, but considered him weekly for reinstatement to a suitable position. Two years later, Jay believed he could return to work and asked three doctors to allow his return. All three doctors refused. In 1996, Jay saw a fourth doctor who gave him a medical release. However, because this doctor was not one of Jay's original treating physicians, the company refused to return him to work. Jay's original doctors were contacted and they all refused to return him to work. Over the next 20 months, Jay insisted that the company find him a suitable position working at ground level. In 1998 the company recalled Jay for a position on the ground level and, in 1999, transferred him to another position working at ground level. Jay sued the company under the Americans with Disabilities Act contending that he was discriminated against on the basis of a perceived disability and that the company failed to provide reasonable accommodations.

In Jay v. Intermet Wagner, Inc. (12/4/2000) the U.S. Court of Appeals for the Seventh Circuit held that the ADA did not require that the company restructure Jay's job to allow work at the ground level. Although Jay pointed to two millwrights who worked mainly at ground level, the company was not required to shuffle their job responsibilities to create a position to accommodate Jay's disability. The court found that the company acted properly when it decided to reassign Jay to new positions rather than restructure the millwright position, even where that process took 20 months.

Microsoft Settles Temporary Worker Class Actions for $97 Million

In a Class Action Settlement Agreement filed in the U.S. District Court for the Western District of Washington (12/12/2000) Microsoft Corporation agreed to pay $96,885,000 to a settlement fund for distribution to workers claiming they were common law employees and, therefore, were eligible to participate in company stock purchase plans, 401(k) plans, health, life insurance and disability plans, and paid leave, including sick leave, holidays and vacation. The settlement agreement recognizes that, as a result of Microsoft's significant job reclassifications in 1997, Microsoft is not required to change any of its current job classifications and is not restricted from enacting new policies or practices regarding temporary workers. Qualified temporary workers would receive compensation equivalent to

what they would have received under Microsoft's benefit plans had they been properly classified as employees. In addition, the settlement agreement provides that the workers who filed the actions each will receive incentive compensation of as much as $65,000.

"He Said, She Said" Sex Discrimination Case Sent to Trial

Booker T. Washington Broadcasting Service owned WENN radio station in Alabama. WENN broadcasted a morning radio program hosted by Dave Donnell. When ratings began to slip, WENN hired Dallas Johnson as a co-host. During the four months of Johnson's employment, listeners and co-workers frequently complained about the hostile interaction between Johnson and Donnell. In response, WENN moved Johnson from morning to middays, and later from middays to late nights, resulting in less pay. Johnson complained about the shift changes and pay cut but WENN management refused to make any changes. Johnson left and never returned to work. Believing Johnson had quit, WENN arranged for an exit interview. At the interview, Johnson alleged for the first time that WENN was terminating her in retaliation for her refusal to submit to Donnell's sexual advances.

Johnson filed a complaint alleging sexual harassment. She claimed that Donnell said she had a sexy voice, winked at her, stared at her in a sexual manner, told her he liked her, attempted to massage her shoulders against her wishes, stuck his tongue out at her in an obscene manner, and engaged in other allegedly sexual conduct. Before trial, the trial court dismissed all of Johnson's claims.

In Johnson v. Booker T. Washington Broadcasting Service, Inc. (11/29/2000) the U.S. Court of Appeals for the Eleventh Circuit rejected the trial court's finding that falling ratings and incompatible on-air personalities justified Johnson's transfers and pay cut. Instead, the court found enough evidence, based on Johnson's testimony, that she rebuffed Donnell's sexual advances and that Donnell had participated in the decision to move her to middays and possibly to the late night shift. Because of the factual dispute, the court directed that the case be submitted to a jury.

In addition, the court questioned whether Donnell was Johnson's supervisor at the time of the shift changes and paycut. Although WENN relied upon its sexual harassment policy and procedures as an affirmative defense, it is unclear whether Donnell was a co-worker (which would permit the affirmative defense) or a supervisor (which would bar the affirmative defense). Accordingly, the court remanded the case to the trial court for further proceedings or a trial.

CBIA Issues New COBRA Guide Written by Robinson & Cole

We are pleased to announce that the Connecticut Business & Industry Association has recently published "CBIA's Complete COBRA Guide" including HIPAA and Connecticut Group Health Continuation Law. Written by Robinson & Cole attorneys, this

comprehensive, quick reference guide is designed for employee benefits professionals responsible for group health plan continuation-of-coverage compliance. For more information, please visit the CBIA website.

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