Date Issued: 02/26/2001

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

e-News is a bi-weekly electronic newsletter reporting on recent court decisions, new statutes and other timely and topical information. Where appropriate, e-News provides web links to databases where recipients can easily access the actual decisions, statutes or other information. Navigating e-News is just like navigating the web. To access a web link, simply position your cursor on the link and click your mouse. To return to e-News, hit the back button on your browser.

We hope you enjoy e-News. If you know of others who would enjoy receiving this online newsletter (or if you would like to discontinue receiving e-News), pleaseclick here and send us an e-mail message. If you would like certain information covered in future issues, please let us know. We welcome your feedback.

Company President Breached His Employment Agreement by Abandoning His Job

Rene Perez was the founder and president of a computer software company that was acquired by Mercury Air Group, Inc. Perez entered into an employment agreement with Mercury whereby he agreed to continue as president of the new company for five years. In exchange for his services, Perez would receive an annual salary of $300,000, plus a bonus and fringe benefits. The employment agreement also gave Mercury the right to terminate Perez's employment "for cause," which included Perez's voluntary abandonment of his job.

Perez claimed that Mercury reduced his role as president by hiring an independent consultant to prepare written reports about the company and by involving its vice president in the company's finances and operations. Because Perez felt that these individuals took over his responsibilities as president, Perez left his job and filed suit against Mercury. Perez argued that Mercury constructively discharged him and, thus, breached their agreement by usurping his authority as president. Mercury counter-sued claiming that Perez breached the employment agreement by permanently and voluntarily abandoning his position.

In Mercury Air Group, Inc. v. Perez, No. 00-civ-2975 (HB) (1/31/2001), a federal trial judge in New York concluded that Perez's "constructive discharge claim can't fly." At his deposition, Perez gave numerous examples of how Mercury took away his ultimate control to make decisions. At the same time, he conceded that his actual duties were not significantly changed after Mercury bought the company and that his working relationship with Mercury's consultant and vice-president was "cordial." Perez also never complained to Mercury about his dissatisfaction. Given these facts, the court concluded that Perez was not forced out of his job.

The court found in favor of Mercury on its claim that the president breached his employment agreement when he permanently left his position. Perez did not provide Mercury with any notice of his plans to leave the company, even though he agreed in his employment agreement to give Mercury 30 days to cure any claimed breach of the contract.

EEOC Files Lawsuit against Railroad and Railroad Agrees to End Genetic Testing

On February 9, 2001, the U.S. Equal Employment Opportunity Commission filed its first court action against an employer claiming that its genetic testing of workers who claim work-related injuries due to carpal tunnel syndrome violates the Americans with Disabilities Act. According to the EEOC's Press Release, the EEOC seeks an injunction against Burlington Northern Santa Fe Railroad to put an end to the realroad's nationwide policy requiring all railroad union workers with carpal tunnel injuries to give blood samples for DNA testing.

The EEOC claims that the workers were asked for blood samples but not asked to consent to the use of these samples for genetic testing or even told that the blood samples would be used for a genetic test. The EEOC also contends that at least one employee who refused to provide a blood sample because he suspected it would be used for genetic testing was threatened with discharge. The EEOC's position is that basing employment decisions on genetic testing violates the ADA.

A Railroad spokesperson stated that the company did not seek blood tests on every worker who filed a workers' compensation claim for carpal tunnel syndrome. In addition, the few workers who did undergo genetic testing gave the company consent. The Railroad also disputes the EEOC's claim that workers who did not submit to genetic testing were told that they would be subject to disciplinary action. In response to this widely-publicized suit, the Railroad announced on February 12, 2001 that it will end genetic testing of workers with carpal tunnel syndrome.

Federal Circuit Court Announces Framework for USERRA Cases

The Uniformed Services Employment and Reemployment Rights Act prohibits

discrimination in employment on the basis of military service. A violation of USERRA occurs when a person's military service is a motivating factor in an employment action, even if it is not the sole factor. In Sheehan v. Department of the Navy (2/9/2001) http://www.fedcir.gov/dailylog.html, the Federal Circuit Court set forth a framework for analyzing cases under USERRA.

Patrick Sheehan and Ronald Fahrenbacher are retired military officers who both served in the Navy Judge Advocate General Corps. They applied for a new civilian position of Attorney Advisor and Counsel to the Commander of the Naval Training Center. When they both were rejected, they filed suit against the Department of Navy claiming that they were not selected because of their service in the military.

The Federal Circuit stated that a burden-shifting analysis applies to USERRA cases. Under this framework, an employee claiming that he has been discriminated against on the basis of his military status must first show that his military service was "a substantial or motivating factor" in the employment action at issue. The employer must then prove that the same action would have been taken regardless of the individual's protected status.

Applying this framework, the claims were dismissed because Sheehan and Fahrenbacher could not prove that their military status was a "motivating factor" in the decision not to hire them. The evidence showed that two of the five finalists (Sheehan and Fahrenbacher were not finalists) had served time in the military.

Courts Consider Employer's Obligations under the ADA

In Wurzbach v. City of Tacoma (2/15/2001), the Washington Appellate Court ruled that an employer does not have a continuing duty to investigate whether a disabled employee is still disabled. David Wurzbach worked at the building permit counter for the City of Tacoma. His job duties required a great deal of contact with the public. In 1993, he was diagnosed with leukemia. Wurbach informed his employer that his doctor recommended that he have limited public contact. The City created a position for him that involved minimal public contact. Wurzbach later told his supervisor that he was in remission. Wurzbach did not tell anyone in the personnel office about his remission or that he wanted a position that involved public contact.

In 1995, a position opened in another department. Even though Wurzbach was on the list of eligible employees for this job, an administrative manager decided that Wurzbach was not a potential candidate because it required significant public contact. Because the City did not notify Wurzbach about this job opening, he did not apply for it. Wurzbach later sued the the City for disability discrimination.

Wurzbach acknowledged that the City reasonably accommodated his disability by creating a new position for him. The issue that the court had to decide was whether the City discriminated against Wurzbach by failing to tell him about the position that opened in 1995. The court concluded that Wurzbach did not provide his employer with sufficient

notice that his medical condition had improved and that he wanted to be considered for jobs involving public contact. “If the duty to report a disability rests with the employee, the duty to report any clearing of the disability should also rest with the employee,” the court explained. The City did not violate the state’s disability discrimination laws because its obligations under these laws ended when it created a position for him, and it had no continuing duty to monitor Wurzbach’s medical condition or to notify him of future job openings.

The extent of an employer’s obligations to provide reasonable accommodations under the ADA was also at issue in Humphrey v. Memorial Hospitals Association (2/13/2001). Carolyn Humphrey, a medical transcriptionist at Memorial Hospitals, was diagnosed with obsessive compulsive disorder. Her obsessive behavior included washing and brushing her hair for up to three hours each morning, dressing very slowly and pulling out random strands of her hair because she thought something was crawling on her head. These actions soon led to tardiness and absenteeism problems because of her inability to get to work on time.

Once Humphrey brought her disorder to the attention of the Hospital, it agreed to provide her with a flexible start-time as a reasonable accommodation. Even with this arrangement, Humphrey’s tardiness issues continued. She later asked to work at home to accommodate her condition. The Hospital denied her request because Humphrey had received disciplinary warnings for her attendance and tardiness. The Hospital did not explore any other options. Instead, Humphrey’s employment was terminated several months later because of her attendance problems.

Humphrey claimed that the Hospital violated the ADA because it failed to reasonably accommodate her disability. The U.S. Court of Appeals for the Ninth Circuit agreed. Once an employee informs an employer of a need for an accommodation under the ADA, the employer must engage in an interactive process with the employee to identify and implement appropriate reasonable accommodations. This interactive process requires open lines of communication between the employer and the employee and good-faith exploration of possible accommodations. A breakdown of this process occurred in this case.

The court concluded that the employer’s duties under the ADA extend beyond the first attempt at accommodation. The employer must explore different accommodations if requested by the employee or if the employer knows that the first acccommodation is not working. The Hospital should have known that Humphrey’s flexible-work schedule was not helping because she continued to be tardy or absent from work. When she asked if she could work from home, the Hospital should have granted it or at least explored other alternatives.

U.S. Supreme Court Rules that State Employees Cannot Bring ADA Claim

In University of Alabama v. Garrett (2/21/2001), the U.S. Supreme Court ruled that two State employees could not sue their Alabama State employers for money damages under the

Americans with Disabilities Act. Patricia Garrett was a registered nurse and working as Director of Nursing at the University of Alabama. She was diagnosed with breast cancer and underwent surgery, radiation treatment and chemotherapy. When she returned to work, she was demoted into a lower paying position as a nurse manager. Milton Ash was a security officer for the Alabama Department of Youth Services. Because he had chronic asthma, he asked the Department to change his job duties to minimize his exposure to carbon monoxide and cigarette smoke, as his doctor had recommended. His employer denied this request. Garrett and Ash filed separate suits against their employers alleging violations of the ADA.

The Court found that the Eleventh Amendment barred both of these suits. The Eleventh Amendment gives the States constitutional immunity from lawsuits by private individuals.

For more information, please contact us

Stephen W. Aronson	Lisa Gizzi	Peter J. Moser
860-275-8281	860-275-8244	617-557-5923

ROBINSON & COLE LLP
Boston - Hartford - Stamford - Greenwich - New York

Visit our Labor, Employment and Benefits Practice website at www.rc.com