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

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Court Explains Risks of Arbitrating Employment Claims

As a result of the U.S. Supreme Court's decision in Circuit City Stores, Inc. v. Adams reported in our March 26, 2001 issue of e-News, a number of companies are considering whether to require resolution of employment disputes through mandatory arbitration. In Keebler Co. v. Truck Drivers, Local 170 (4/23/2001) the U.S. Court of Appeals for the First Circuit explained why some companies may not wish to arbitrate employment claims. Click here for a map of the federal circuits.

Keebler discharged an employee for gross insubordination and fighting on the job. The employee and his union arbitrated the discharge in accordance with the union's collective bargaining agreement. The arbitrator found that Keebler improperly discharged the employee and ordered his reinstatement without back pay. Keebler sued in federal court to vacate the arbitration award. The court found that the arbitrator departed from the language of the collective bargaining agreement and upheld the discharge.

In reviewing the lower court's decision, the First Circuit noted that successful court challenges to arbitration awards are rare and that the parties, having chosen to arbitrate their disputes, must abide by the arbitrator's rulings. Although the collective bargaining agreement did not articulate a standard of proof to be used by the arbitrator, the First Circuit did not find it improper that the arbitrator required that Keebler prove the reasons for discharge by a higher "clear and convincing evidence" standard rather than the more usual "preponderance of the evidence" standard. The First Circuit also let stand the arbitrator's decision that the phrase fighting on the job required that Keebler prove that the employee actually started the specific fight. Finally, because the collective bargaining agreement did not require that the arbitrator issue a written decision of his reasons for his award, Keebler was not entitled to an explanation of why the employee's actions did not amount to gross insubordination.

Arbitration Agreement Ruled Invalid

In another arbitration case, Geiger v. Ryan's Family Steakhouses Inc. (3/21/2001), the U.S. District Court in Indiana considered whether to enforce an arbitration agreement. Frederica Geiger completed an application for employment at Ryan's and, as part of the application, signed an arbitration agreement. The arbitration agreement was styled as a contract between the applicant and Employment Dispute Services, Inc. Along with the application, Geiger received a copy of EDSI's rules governing arbitrations.

Geiger filed an action claiming that Ryan's and its restaurant manager sexually assaulted and battered her. Ryan's and the manager moved for a stay of the action and an order compelling Geiger to submit her claims to arbitration in accordance with the arbitration agreement. The court refused to enforce the arbitration agreement. The court noted that EDSI was biased in that it had a financial interest in maintaining its arbitration service for the benefit of Ryan's. The court also noted that EDSI retained full authority to select the potential arbitrators and adopt varying rules including limiting a plaintiff's right to depose witnesses. The court also noted the burdensome fee structure that required an employee to pay one-half of the fees and required payment of the fee upfront. The court also ruled that the arbitration agreement was an unconscionable contract due to its potential for bias, the disparate bargaining power of the parties and Geiger's lack of understanding of the terms of the agreement. The court noted that the agreement failed for lack of consideration and was illusory because EDSI could change the arbitration procedures at any time and Ryan's could revoke the agreement on ten days notice.

Court Reinstates Sexual Harassment Claim because of Conflicting Sexual Harassment Policies

Bridgette Frederick filed a claim of sexual harassment in violation of Title VII against Sprint/United Management Company. Frederick claimed that her supervisor stared at her for prolonged periods, looked her up and down, and blew kisses at her. She also claimed that he

visited her workstation throughout the day, rubbed his face and hair against her jaw, kissed her on the cheek and touched her breasts. Frederick requested transfers but Sprint never acted on her requests.

Sprint sought to dismiss Frederick's claim on the ground that it had an established sexual harassment policy that Frederick failed to follow. Sprint demonstrated that it had distributed a 1990 policy concerning sexual harassment that required employees to report sexual harassment to their supervisors and/or human resources immediately, a code of ethics that required employees to report any instances of sexual harassment immediately to their supervisor, and a 1994 sexual harassment policy that required employees to report any incidents to their supervisor, human resources or a member of management with whom he or she felt comfortable.

In response, Frederick claimed that she never received the 1990 policy nor was it posted on her floor. Although she acknowledged receiving the code of conduct, she could not understand how to file a complaint under it. She also claimed that she did not receive the 1994 policy until she requested the policy from human resources after the harassment. Finally, Frederick claimed that she spoke to a representative from management who advised her not to file any complaint.

Based on the existence of Sprint's sexual harassment policies and Frederick's failure to abide by them, the lower court dismissed Frederick's claim. However, in Frederick v. Sprint/United Management Company (4/4/2001) the U.S. Court of Appeals for the Eleventh Circuit reversed the lower court, finding that whether Sprint had an effective sexual harassment policy should be determined by a jury. Employers have an affirmative defense that the employer exercised reasonable care to prevent and promptly correct harassing behavior and that a plaintiff unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer. But the court determined that Frederick's statement that she never received the policies combined with conflicting wording in those policies over to whom Frederick was required to report the alleged harassment were issues best left to a jury.

Employer's Request for a Medical Exam Does Not Establish ADA Liability

Randy Tice was employed as a bus driver for the Centre Area Transportation Authority of State College. During the course of his employment, Tice sustained a number of injuries to his back. CATA had a policy requiring a return to work certificate from a treating physician affirming that the employee was physically fit to resume his or her duties. Following one of his injuries, Tice provided a signed doctor's note permitting him to return provided CATA provided accommodations. In response, CATA required Tice to submit to an independent medical examination to assess whether he was physically fit to return to work. No other employee had ever been requested to submit to such a medical exam following a medical leave. Tice claimed that the requirement that he submit to a medical exam before returning to work violated the Americans with Disabilities Act. He alleged that the requirement that

the ADA.

In Tice v. Center Area Transportation Authority (4/23/2001), the U.S. Court of Appeals for the Third Circuit ruled that an employer's request for a medical examination, standing alone, is not sufficient to establish that the employer regarded the employee as disabled. In affirming dismissal of Tice's claims, the court noted that the ADA permits medical examinations upon a showing of job-relatedness and business necessity.

ADA Does Not Require Employer to Place Employee in New Job or Accommodate School Schedule

Fred Boykin worked as a part-time bus driver for ATC/Vancom of Colorado. He also was a full-time college student. Boykin suffered from transient ischemic attacks or mini-strokes. Following an attack, Vancom required that Boykin be examined by a physician who revoked Boykin's driving certificate. Boykin requested, as a reasonable accommodation, that he be moved to a dispatch operator or data entry position. However, the only position open at that time was a bus cleaner which Boykin declined because it conflicted with his school schedule. In the absence of any open position, Boykin was terminated. Six months later, Vancom hired new personnel including a dispatch operator. Boykin interviewed but was not hired. Boykin filed an action under the Americans with Disabilities Act claiming Vancom was obligated to assign him to the new dispatcher position without requiring that he compete with other applicants. Boykin also claimed that Vancom violated the ADA by offering him the bus cleaner position knowing that it conflicted with his school schedule.

In Boykin v. ATC/Vancom of Colorado, L.P. (4/17/2001) the U.S. Court of Appeals for the Tenth Circuit affirmed dismissal of Boykin's ADA claims. The court ruled that Vancom was not required to place Boykin on extended leave awaiting the outcome of the contract negotiations that may have resulted in a new dispatcher position becoming available. Because of the six month gap between Boykin's termination and the availability of the dispatcher position, Vancom was entitled to require that Boykin compete with other candidates. The court also ruled that the ADA did not require that Vancom accommodate Boykin's school schedule. Accordingly, Vancom did not violate the ADA by offering Boykin the bus cleaner position knowing that he could not accept it due to his school schedule.

Salesman's Proposed Agreement for a Distributor Given to Management to Address Pay and Working Conditions Was Not Protected Concerted Activity under the NLRA

Karl Abbadessa was a commission salesman for Alldata Corporation. Abbadessa and other salesmen were concerned with Alldata's commission structure in light of its recent contract with another company to distribute its products in the same territory as Alldata's own salesmen. Abbadessa wrote to Alldata's president to complain and gave its vice president of sales an agreement to be signed by the distributor. Within two weeks, Alldata terminated

Abbadessa's employment for failure to maintain his sales volume.

Abbadessa filed an unfair labor practice charge claiming that his conduct was protected concerted activity under the National Labor Relations Act. An administrative law judge agreed and the National Labor Relations Board affirmed the decision. Alldata appealed.

In Alldata Corp. v. NLRB (4/13/2001), the U.S. Court of Appeals for the District of Columbia Circuit ruled that, although Abbadessa's efforts to address the commission structure of his fellow salesmen were protected activities under the NLRA, the NLRB ignored Alldata's evidence that Abbadessa failed to meet his sales quota. In addition, the court ruled that Abbadessa's drafting of a proposed agreement with the distributor was an improper attempt to influence Alldata's contractual relations with the distributor and thus was not protected concerted activity. Accordingly, the court upheld Alldata's termination of Abbadessa's employment.

Back Pay under WARN Act Includes Tips and Vacation Pay

In Local Joint Executive Board of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc. (4/11/2001) the U.S. Court of Appeals for the Ninth Circuit ruled that the definition of back pay under the federal Worker Adjustment Retraining and Notification Act includes tip income and vacation pay. The court also ruled that severance pay to employees in exchange for working through the date of closure are not deductible from the damages payable under the WARN Act.

Las Vegas Sands gave employees 45 days rather than 60 days advance notice of the closure of its hotel casino. In an apparent effort to reduce damages under the WARN Act, the hotel offered severance to certain employees who agreed to work through the date of closure. The hotel also agreed to pay employees for the days of work falling within the 15-day period. The court found that the hotel erred in calculating damages under the WARN Act and ordered that the hotel must pay 15 days of compensation including what the employees would have received in tips and double time for employees who would have worked on a holiday occurring during that time period. The court also ruled that, while the WARN Act allows an employer to reduce its liability by making voluntary and unconditional payments, the severance was conditioned on the employees working through the date of closure and, accordingly, were not voluntary and unconditional.

Termination Pay Not an Administrative Priority Claim in Bankruptcy

In In re: Commercial Financial Services, Inc. (4/24/2001) the U.S. Court of Appeals for the Tenth Circuit considered whether lump sum cash payments due to employees upon termination and promised as part of prepetition employment agreements were entitled to priority as an administrative expense in the company's eventual bankruptcy. John Bachman and Bruce Phelps entered into employment contracts with Commercial Financial Services.

Both employees were promised lump sum cash payments upon termination unless termination was for cause. CFS filed a bankruptcy petition and Bachman and Phelps continued to work for the company. Both were paid their regular salaries for all postpetition work. Following their terminations, Bachman and Phelps sought to classify their lump sum payments as priority administrative claims.

The court ruled that the lump sum payments were not necessary costs and expenses of preserving CFS's bankruptcy estate nor were the payments compensation for their postpetition employment services. The court rejected their claim that working for CFS for three weeks following the filing of the bankruptcy petition provided CFS with essential services benefiting the bankruptcy estate. Instead, the court found that they were fully paid for their services and that the lump sum payments were general unsecured claims.

For more information, please contact us

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