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Welcome to e-News: A Service from Robinson & Cole LLP

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.

New OSHA Poster

On August 9, 2000, the federal Occupational Safety and Health Administration issued a new poster for informing workers of their rights to a safe workplace. The poster may be downloaded from OSHA's website. Employers are not required to replace their existing posters with this poster.

Job Responsibilities Are More Important Than Job Titles in Equal Pay Act Claims

In Rodriguez v. Smithkline Beecham Pharmaceutical, P.R., Inc. (8/16/2000) the U.S. Court of Appeals for the First Circuit affirmed dismissal of a female employee's claim for unequal wages under the federal Equal Pay Act. The court determined that the employee failed to prove that male employees were paid more money for similar work. Although the plaintiff showed that she was paid less than male employees in positions with the same job titles, the court focused on their job responsibilities. The court noted that some of the males had more job responsibilities than the plaintiff that justified their higher pay. Other males held similar

positions but received higher pay. For those males, the court noted that they came from higher-paying jobs and were placed in temporary lower-paying jobs for employee development at their existing higher compensation.

Union Agreement Barred Immediate Termination of Employee Who Uttered Profanities

In Hawaii Teamsters & Allied Workers Union, Local 996 v. United Parcel Service, Inc. (9/6/2000) the U.S. Court of Appeals for the Ninth Circuit ruled that UPS improperly terminated an employee who uttered profanity to a payroll clerk and the human resources director and refused to stop swearing. The employee, represented by his union, asserted that the collective bargaining agreement allowed immediate discharge only for certain listed offenses which did not include swearing or insubordination. An arbitrator and a reviewing federal district court both found that the collective bargaining agreement was ambiguous, that the list of offenses was not an exclusive list and that the employee violated customary industry standards. The Ninth Circuit disagreed and found that, in the absence of any limiting language, the company was required to give advance notice and pursue the grievance procedures under the collective bargaining agreement. If UPS wanted the right to terminate employees immediately for certain conduct, then it should have allowed for those terminations in the collective bargaining agreement.

64 Year Old Recovers Nearly $300,000 Under ADEA

Benigno Munoz was terminated for insubordination after working 27 years as a room service waiter. His employer, a resort, alleged that he was insubordinate for failing to abide by an instruction not to discuss a reprimand issued the day before for kissing a female employee on the cheek. Munoz conceded that he often greeted female coworkers with a kiss on the cheek, as is customary among individuals of Cuban descent. Munoz was 64 years old at the time of his termination.

Munoz filed a claim for discrimination in violation of the Age Discrimination in Employment Act and the Florida Civil Rights Act. After a trial, a jury awarded him nearly $60,000 in back pay, $60,000 in liquidated damages, $150,000 in damages for emotional distress and dignitary injury, and more than $20,000 in front pay.

On appeal to the U.S. Court of Appeals for the Eleventh Circuit, the resort claimed that an award of back pay was inappropriate because Munoz began collecting social security benefits, that the damages for emotional distress were excessive and that he would have been layed off barring an award of front pay. However in Munoz v. Oceanside Resorts, Inc. (8/25/00) the court credited Munoz' testimony that he consistently pursued employment opportunities after his termination. The court also upheld the award of $150,000 for emotional distress ruling that it was not so excessive as to shock the conscience of the court. The court recognized that an award of front pay to a plaintiff who ultimately would have been terminated may confer a windfall; however, the court found that, notwithstanding the

resort's evidence that it eliminated all room server positions, the jury was able to assess whether he would have been eligible for another position and the resort did not sustain its burden of proving that he was not eligible for any other positions. Accordingly, the court affirmed the damages award.

Cash Balance Plan Miscalculated Distributions

In one of the first decisions about cash balance pension plans, Esden v. Bank of Boston (9/12/2000), the U.S. Court of Appeals for the Second Circuit ruled that a cash balance pension plan miscalculated a participant's lump-sum pension distribution by using an interest rate lower than the minimum rate guaranteed by the plan. Although the former employee sued for a shortfall of about $61, the case was brought as a class action under the Employee Retirement Income Security Act. As a result, the plan must compensate all plan participants within the class and must pay attorney's fees.

This case concerned the rules applicable to the somewhat controversial cash balance plans. A cash balance plan is a type of defined benefit plan that looks like a defined contribution plan. Although benefits are expressed as a theoretical account, at retirement the plan adjusts the account into a form of an annuity for the retiree based on certain actuarial factors. The plan in this case allowed a retiree to elect a lump-sum payment. To calculate the lump sum, the plan, relying on IRS regulations, used an interest rate that differed from the plan rate, causing a shortfall. Although the plan and the lower court had relied upon IRS rulings for the calculation, the appeals court pointed out that those IRS rulings could not contradict the express statutory rights of plan participants under ERISA. The court did not address whether cash balance plans tend to discriminate against older plan participants, perhaps in violation of ADEA.

Stay-at-Home Mom Not Entitled to Front Pay under Title VII

In Caudle v. Bristow Optical Co. (9/14/2000) the U.S. Court of Appeals for the Ninth Circuit ruled that an employee who had elected to stay at home with a newborn baby could not recover front pay damages for pregnancy discrimination under Title VII of the Civil Rights Act. The employee had been terminated in her eighth month of pregnancy.

After a trial on Caudle's claims of pregnancy discrimination and wrongful termination, a jury awarded her $15,000 in compensatory damages, $10,000 in back pay and $55,000 in punitive damages under Title VII. The trial court reduced these amounts to $10,000 in damages and $50,000 in punitive damages. On appeal, Caudle argued that the trial court improperly barred recovery of front pay because of her decision to stay at home to care for her baby. Caudle argued that she should recover several years of pay. The company argued that her voluntary decision to stay home violated Title VII's duty that she mitigate damages by working. The court determined that her decision to dtay home was voluntary and that to award her front pay would conflict with the underlining objective of Title VII to make the

plaintiff whole for any discrimination.

Ambiguous Pension Plan Must Include Part-Time Employees as Participants

In Central States, Southeast and Southwest Areas Pension Fund v. Kroger Co. (9/15/2000) the U.S. Court of Appeals for the Seventh Circuit determined that the company had improperly excluded part-time employees from participating in a pension plan. Although the plan excluded contributions for "casual employees" the plan required contributions for regular employees who worked on a part-time basis. The company asserted that the plan excluded part-time employees and tried to show that part-time employees were the same as casual employees. But the court found that part-time employees shared many attributes of regular, full-time employees except for the number of hours worked.

This case illustrates the importance of clearly drafting and following the plan's eligibility provisions. Ambiguous definitions may result in certain employees recovering benefits, contrary to the company's intention.

Robinson & Cole LLP Announces Launch of BusinessVisaLink.com

The Immigration Practice Group has launched BusinessVisaLink.com to provide an immigration resource for small businesses and large corporations alike that work every day to hire and retain valuable foreign national employees. The site links the INS and Department of Labor websites, provides a wealth of information on hiring foreign nationals and contains useful tools for employers, including current INS processing times.

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

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