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e-News: A Value-Added Service from Robinson & Cole LLP

In response to requests from our clients and friends for information about recent developments in labor, employment and benefits law, we are pleased to provide you with our first issue of e-News. 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 also provides web links to public 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.

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US Supreme Court Rejects "Pretext Plus" Evidentiary Standard for Proving Age Discrimination under ADEA

Settling a split among the U.S. Circuit Courts, the U.S. Supreme Court ruled that a plaintiff's prima facie case of discrimination combined with evidence tending to show that the employer's reason for its adverse employment action was pretextual provides sufficient circumstantial evidence to sustain liability under the Age Discrimination in Employment Act.

In Reeves v. Sanderson Plumbing Products, Inc. (6/12/2000), the Supreme Court rejected the Fifth Circuit's "pretext plus" standard that required an employee to show both that the employer's reason for adverse action was false and that the real reason was discrimination. The Supreme Court explained that a jury may infer discrimination from evidence that the reason offered by the employer was not its true reason but instead was a pretext for

discrimination.

As a result of this important decision, employers are expected to have a more difficult time persuading lower courts to dismiss age discrimination claims, and similar claims, on summary judgment. This decision suggests that courts may scrutinize evidence tending to prove that the employer's reason for the adverse action is false. Accordingly, employers should be certain that their nondiscriminatory reason for adverse action can survive an evidentiary challenge.

NLRB Extends to Nonunionized Employees the Right to Have a Coworker Present during Investigatory Interviews that May Result in Disciplinary Action

In a decision with far-reaching implications for employers, a divided National Labor Relations Board ruled in Epilepsy Foundation of Northeast Ohio (7/10/2000) that Section 7 of the National Labor Relations Act, which gives unionized employees the right to have a representative present during employer disciplinary interviews, is now extended to employees in nonunion workplaces.

The three member majority, reversing 12 years of precedent, decided that there was no reason to deny nonunionized employees the same right. The majority explained that, consistent with the NLRA's protection for employees engaged in concerted activity, the right to have a coworker present affords employees the opportunity to act in concert to prevent an employer's practice of unjust punishment. The majority also explained that, once an employee raised the right to have a coworker present, the employer could refuse to conduct the investigatory interview.

Two sharply worded dissents asserted that there was no sound reason for overturning 12 years of precedents and that the majority’s decision disrupts the balance between labor and management established by Congress. They also pointed out how the majority’s decision would harm the employer’s ability to deal with its employees on an individual basis, notwithstanding the absence of a union. This decision, they explained, forces employers to deal collectively with employees without the employees having first achieved recognitional status and without having been certified by the NLRB as a proper union. The dissents also pointed out that, practically speaking, an employer's right to forego an investigatory interview was unrealistic.

Although this decision probably will be appealed to the Sixth Circuit, we cannot predict the outcome. Furthermore, as this is an NLRB decision, it is possible that employees working in other regions now will assert similar rights hoping to obtain similar rulings from the NLRB in those other jurisdictions.

In the meantime, how employers respond to an employee’s request that a coworker attend an investigatory interview that reasonably may lead to discipline should be left to the specific facts of that situation. Note that employers are not obligated to advise employees of

this right; the employee must ask for the coworker. Also, if the interview is not reasonably expected to result in disciplinary action, there is no right to have a coworker present. Employers may also wish to balance the harm from not holding an interview with the harm from allowing a coworker to be present.

Second Circuit Rules that At-Will Employees May Sue for Race Discrimination under Section 1981 of the Civil Rights Act

The U.S. Court of Appeals for the Second Circuit has joined the Fourth, Fifth and Tenth Circuits in ruling that an at-will employee may sue for race discrimination under Section 1981 of the Civil Rights Act of 1866 which bars discrimination in the making and enforcement of contracts. The Second Circuit includes Connecticut, New York and Vermont.

In Lauture v. International Business Machines (6/20/2000), the court rejected IBM's defense that Lauture, a former Director of Human Resources and an admitted at-will employee, lacked an employment contract that was necessary for relief under Section 1981. The court observed that an employee's promise to perform work in exchange for compensation was sufficient to establish a contract under Section 1981.

The court also rejected IBM's defense that Title VII, rather than Section 1981, provided the proper remedy. The court explained that, because Title VII only applies to employers with fifteen or more employees, "Were this court to exclude at-will employees from the scope of [Section] 1981, at-will employees at small businesses would be left with no remedy for workplace discrimination."

FMLA Regulations Requiring Prospective Notice of FMLA Leave Entitlement Ruled Invalid by Eighth Circuit

In Ragsdale v. Wolverine Worldwide, Inc. (7/11/2000), the U.S. Court of Appeals for the Eight Circuit ruled that the Department of Labor's FMLA regulations which provide that, unless an employer prospectively designates company leave as FMLA leave, the twelve week FMLA leave does not begin to run, impermissibly expand the rights afforded to employees under the FMLA. The Eighth Circuit covers Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota.

Ragsdale, the plaintiff, was diagnosed with cancer and requested a medical leave. Wolverine's leave policy allowed employees to take leave for up to seven months. Although Wolverine permitted Ragsdale to take leave for the full seven months, it never notified her of her eligibility to take leave under the FMLA or her right to have her leave designated as FMLA leave. When Ragsdale exhausted her seven months leave and was unable to return to work, she was terminated. Within a week, Ragsdale asked to return to work and requested additional FMLA leave. After Wolverine denied her request, she filed a lawsuit. She claimed that, under the FMLA regulations, Wolverine failed to inform her that she may

apply for FMLA leave and so she could now apply for that leave, notwithstanding the fact that she already obtained a greater period of leave under Wolverine's leave plan.

Acknowledging a split among the courts, the court determined that the DOL regulations improperly convert a statutory minimum of unpaid leave into a regulatory entitlement to an additional twelve weeks of leave unless the employer prospectively notifies the employee that such leave is counted as FMLA leave. As explained by the court, "Entirely absent from the text of the FMLA is any indication that the FMLA was designed to entitle an employee to additional leave under the FMLA when the employer's leave plan already provides for twelve weeks of FMLA qualifying leave."

While this is good news for employers, especially those located within the Eight Circuit, employers in other jurisdictions may wish to determine whether other courts follow this precedent before making any changes to their FMLA notices and procedures.

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