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

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Lack of Training on Discrimination Laws Leads to Additional Award for Reckless Indifference

In [Mathis v. Phillips Chevrolet, Inc.](#) (10/15/2001) the U.S. Court of Appeals for the Seventh Circuit affirmed a jury award in favor of an applicant for a sales position at an automobile dealership. The applicant, Anthony Mathis, was a 59-year old car salesman with over 24 years of experience. He applied twice for a sales position with the dealership, but was never interviewed. The dealership hired seven new salespeople, all younger than Mathis. Mathis sued the dealership claiming age discrimination in violation of the Age Discrimination in Employment Act. A jury awarded \$50,000 damages and the court, finding that the dealership acted in reckless disregard of ADEA, awarded another \$50,000. The appeals court affirmed, explaining that the dealership's manager testified that he was not aware that it was illegal to discriminate on the basis of age. According to the court, a company that leaves managers who have hiring authority in ignorance of the basis discrimination laws makes an "extraordinary mistake" that amounts to reckless indifference.

Requiring Employee to Submit to Blood Test Did Not Violate ADA

In [Boyer v. KRS Computer & Business School](#) (9/10/2001) the U.S. District Court for Minnesota ruled that KRS did not violate the Americans with Disabilities Act when it directed a janitor, Dennis Boyer, to submit to a blood test for hepatitis and HIV. While at work, Boyer cut his finger. His supervisor, who helped stop the bleeding and administered first aid, came in contact with his blood. Boyer informed his supervisor that he had hepatitis. In dismissing his claim for violating the ADA's prohibition on requiring medical exams from employees, the court noted that the ADA allows medical exams if job-related and consistent with business necessity. The court found that KRS asked Boyer for a blood test only after the incident where his supervisor came in contact with his blood and he disclosed that he had a blood disorder. The court also dismissed Boyer's claim that his hepatitis rendered him disabled under the ADA. The court found that Boyer contracted hepatitis B in 1970 and that his disease was not currently active. Although contagious, his hepatitis did not substantially limit any major life activities. The court rejected Boyer's assertion that hepatitis was a sexually transmitted disease that substantially limited his major life activity of reproduction.

Court Rejects Employee's Claim of a Right to Privacy in a Personal Computer

Gary Leventhal was employed as an accountant at the New York Department of Transportation. In response to an anonymous complaint that Leventhal had neglected his duties and violated the DOT's computer policies, an investigation ensued that revealed hidden software programs, files and data stored on Leventhal's computer. Leventhal was disciplined. Following his discipline, Leventhal filed claims against the DOT and several individuals alleging violation of his right to privacy. In [Leventhal v. Knappek](#) (9/26/2001) the U.S. Court of Appeals for the Second Circuit ruled that, while Leventhal had a reasonable expectation of privacy in the contents of his office computer, the investigatory search did not violate his right to privacy because the search was reasonably related to the DOT's business objectives and not excessively intrusive. In finding a reasonable expectation of privacy, the court noted that Leventhal occupied a private office with a door and had exclusive use of a desk, filing cabinet and computer that he did not share with any other employees. The court also found that the search was not excessively intrusive because the investigators had a reasonable suspicion that certain files were unauthorized and examined those files but did not examine other files.

Court Rules that Staring May Create a Hostile Work Environment

In [Birshtein v. New United Motor Manufacturing, Inc.](#) (10/9/2001) the California Appellate Court ruled that a nonsupervisory employee's frequent staring at a female employee could create a hostile environment. Michelle Birshtein worked on an assembly line at New United Motor's automobile manufacturing plant. George Bonillia began staring

at Birschtein after she refused to date him. Birschtein complained but New United Motors refused to take any corrective action because there was nothing sexually suggestive about Bonillia's conduct. The appeals court rejected the company's assertion that Bonillia's staring was not based on gender and, thus, not harassment based on sex. The appeals court ruled that sexual harassment does not necessarily involve sexual conduct.

Another Court Invalidates FMLA Regulation

Iva Woodford worked for Community Action of Greene County for almost twelve years. During her last year, she only worked 800 hours due to a disciplinary suspension. Woodford sought leave under the Family and Medical Leave Act because she suffered from stress, anxiety and depression allegedly due to harassment by CAGC's executive director. CAGC indicated that she was eligible for FMLA leave. But it also informed her that she was a "key employee" and would not be reinstated to her former position at the end of her leave because doing so would cause harm to CAGC. Woodford sued CAGC claiming that its denial of reinstatement violated the FMLA. CAGC argued that she was not eligible because she had not worked the requisite hours. In support of her claim, Woodford relied on a Department of Labor regulation, 29 C.F.R. § 825.110(d), which provides that an employer cannot challenge an employee's eligibility after it has already confirmed eligibility. In [Woodford v. Community Action of Greene County, Inc.](#) (10/10/2001) the U.S. Court of Appeals for the Second Circuit affirmed dismissal of Woodford's FMLA claim on the ground that she had not worked a minimum of 1,250 hours within the last twelve months and therefore was not eligible for FMLA leave. The appeals court struck down this regulation because it impermissibly expanded the scope of eligibility beyond the FMLA statute.

Employee with Carpal Tunnel Syndrome is Not Disabled under the ADA

In [Gelabert-Ladenheim v. American Airlines, Inc.](#) (6/12/2001) the U.S. Court of Appeals for the First Circuit ruled that Lisa Gelabert-Ladenheim, a passenger service agent for American Airlines, was not disabled under the Americans with Disabilities Act despite being afflicted with carpal tunnel syndrome resulting in a permanent impairment of 20% of both hands. In assessing whether she was disabled, the court focused on her education level, training, job skills, expertise and knowledge. The court found her qualified for a great variety of jobs, by her own admission. She admitted that she was qualified for positions in advertising, public relations, radio and television production, news writing and editing and English-Spanish translation. Her past work experience was very broad and included jobs in retail sales, documentary narration, voiceovers in Spanish for commercials and translating wire-copy.

Employee's Perception of Performance Cannot Be Used to Show Pretext

member Olsen served as vice president and manager of First State Bank. Olsen observed interactions between his supervisor, Paul Schaller, and a female manager also supervised by Schaller that suggested a sexual relationship. Olsen complained to an employment representative who alerted the bank's chief executive officer. Following the report, Olsen received a negative review and was terminated. He filed a lawsuit claiming sex discrimination and retaliation in violation of Title VII. The lower court dismissed his claims.

On appeal, Olsen argued that his negative evaluation was a pretext for discrimination. The bank countered that Olsen was a poor performer, was a poor manager, did not sufficiently promote the branch, and did not work with walk-in customers. In [Olsen v. Marshall & Ilsley Corporation](#) (9/25/2001) the U.S. Court of Appeals for the Seventh Circuit ruled that it was not enough for Olsen to show that the bank's evaluation was based on an inaccurate assessment of his performance. The proper focus is whether the bank honestly remained dissatisfied with Olsen's performance. The court noted that an employee's perception of his own performance was irrelevant to a showing of pretext.

Requiring Muslim Driver to Abide by Union Bargaining Agreement was not Failure to Accommodate his Religion

Amr Elmenayer was employed as a truck driver for ABF Freight Systems. According to his collective bargaining agreement, drivers bid for routes based on a seniority system. One day, Elmenayer failed to return to work following a lunch break and was terminated. That day, Elmenayer and the union shop steward explained that Elmenayer was a practicing Muslim, that he had been attending prayers at a local mosque and that his delayed return was unintentional. Elmenayer was reinstated. Elmenayer then requested permission to attend Friday prayer services. ABF determined that Elmenayer's seniority would generally allow him to bid for shifts that would not conflict with his Friday prayer obligations. ABF also determined that treating Elmenayer differently would violate its collective bargaining agreements. Elmenayer filed a lawsuit claiming he was denied a reasonable accommodation for his prayer commitments on account of his religion. In [Elmenayer v. ABF Freight Systems](#) (9/20/2001) the U.S. District Court in New York ruled that ABF reasonably accommodated Elmenayer's religious practices and work schedule by requiring him to bid on shifts in accordance with the collective bargaining agreement. Elmenayer's claim that he would have had to bid on routes that required evening or night work did not render ABF's actions unreasonable. By refusing to exercise his option to bid on those other shifts, it was Elmenayer, not ABF, who became responsible for the continuing conflict.

IRS issues Final Rules on Interaction of FMLA and Cafeteria Plans

The [U.S. Internal Revenue Service](#) issued final rules concerning the interaction of the Family and Medical Leave Act with health benefits under cafeteria plans. The rules are very similar to those that were proposed in 1995. However, several changes were made. The new rules allow an employer to require employees to be reinstated in health care coverage after a

period of unpaid FMLA leave if that is the policy for other employees on leave. The rules eliminate a requirement that an employee who elects the catch-up option of repaying premiums during leave must enter into an advance agreement with the employer. Finally, the new rules clarify that an employee on FMLA leave may make changes during open enrollment just like any other employee. The new rules are effective for plan years beginning on or after January 1, 2002.

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