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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.

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Employment Issues the US Supreme Court Will, and Will Not, Address this Term

In the last issue of e-News, we reported on three cases that the U.S. Supreme Court agreed to hear in the current term. The U.S. Supreme Court recently announced that it also will hear argument in a case involving a state's power to enforce a prevailing wage requirement on public works projects. The court will review the Ninth Circuit's decision in G & G Fire Sprinklers, Inc. v. Bradshaw (2/3/1998), amended by Amended Opinion (9/10/1998), which addressed a California law authorizing the state to seize money and impose penalties on subcontractors that failed to comply with prevailing wage laws on public works contracts. The law allowed the state to withhold payments without first providing the subcontractor with notice or an opportunity to be heard. The court concluded that this statutory scheme violated the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution.

The U.S. Supreme Court declined review of an appeal of the Eleventh Circuit's ruling in a sexual harassment case. In Madray v. Publix Supermarkets, Inc. (4/13/2000), two employees sued their employer claiming that their manager hugged, patted and kissed them

and so created a hostile work environment. Publix had a sexual harassment policy containing a specific complaint procedure. The Eleventh Circuit affirmed dismissal of the case because the employees knew about the procedure but failed to use it in a timely manner.

The U.S. Supreme Court also will not review an Eleventh Circuit decision involving reasonable accommodation issues under the Americans with Disabilities Act. In Davis v. Florida Power & Light Co. (3/10/2000), the utility terminated Davis when he refused to work overtime because of a prior back injury. Davis sued the utility claiming that its decision to fire him violated the ADA. The Eleventh Circuit ruled that working overtime was an essential function of the job. Because Davis could not perform this essential function, he was not a "qualified individual with a disability" under the ADA. The court also determined that his requested accommodation, namely, not being required to work overtime, was unreasonable. The accommodation sought conflicted with the seniority rights of other employees under their union's collective bargaining agreement.

Split Among the Circuit Courts on Seniority and Reassignment as Reasonable Accommodations under the ADA

In Jackan v. New York State Department of Labor (3/2/2000), the Second Circuit followed the approach of the Eleventh Circuit in the Davis case on the issue of transfer as a reasonable accommodation under the ADA. Jackan requested a transfer to a desk job after undergoing spinal surgery and being cleared to return to work by his doctors. The defendant, the New York State Department of Labor, refused to transfer him because of the New York Civil Service Law and Rules prohibiting transfers to positions for which there exist "preferred lists" or "reemployment rosters." Jackan filed suit claiming that the DOL's failure to reassign him to another job constituted a failure to accommodate a disability in violation of the ADA.

The Second Circuit held that an employee must first show that a job vacancy existed at the time the transfer was sought to establish an ADA violation in reasonable accommodation cases. Jackan did not meet that burden because there were no vacancies on the "preferred lists" and "reemployment rosters" when he requested the transfer. The court dismissed Jackan's case.

The Ninth Circuit recently took a different approach in Barnett v. U.S. Air, Inc. (10/4/2000), on the issue of seniority systems and the ADA. The court concluded that seniority systems do not necessarily bar reassignment as a reasonable accommodation under the ADA. Barnett injured his back while working in a cargo position for U.S. Air. Upon his return to work after disability leave, Barnett could not meet the physical duties of his job and used his seniority to move to the company's mail room. Several years later, Barnett learned that two employees with greater seniority rights planned to transfer into the mail room, which would "bump" Barnett back into cargo. Barnett requested permission to keep his job in the mail room as a reasonable accommodation under the ADA. U.S. Air denied his request, and

Barnett filed a claim alleging violations of the ADA.

In Barnett, the Ninth Circuit acknowledged that the case involved novel issues for the court, "including the nature and scope of an employer's obligation to engage in the interactive process, [and] whether reassignment is a reasonable accommodation in the context of a seniority system." On the first issue, the court ruled that the "interactive process" under the ADA is mandatory. Factual issues remained on the question of whether U.S. Air engaged in the interactive process.

On the second issue, the court concluded that "reassignment is a reasonable accommodation and that a seniority system is not a per se bar to reassignment." The existence of a seniority system is, however, a factor to be assessed in the undue hardship analysis under the ADA. The court determined that U.S. Air did not show that leaving Barnett in the mail room position would present an undue hardship to the company. It also would not cause an undue disruption to the company's seniority system because it would eliminate only one position from the seniority process.

Consulting Firm Must Pay Unpaid Wages to its Client's Employees

In Petronella v. Venture Partners, Ltd. (10/3/2000), the Connecticut Appellate Court considered the liability of a consulting firm under Connecticut's wage and hour laws. Click he here for the separate dissenting opinion. The president of Venture Partners, Gary Laskowski, and its vice president, Jonathan Betts, contracted with Specialty Publishers to provide consulting services to the company and to help with its financial and management problems. When Laskowski and Betts began working for Specialty Publishers, they decided not to pay wages to the company's employees for August, September and October. While these employees were paid for November and December, Laskowski and Betts fired them in December without paying them back wages. The employees sued them for unpaid wages.

The specific issue before the Appellate Court was whether Venture Partners, Laskowski and Betts exercised ultimate authority and control over the payment of wages to make them liable for the unpaid wages of Specialty Publishers' employees. The court found that Laskowski and Betts had complete dominion over how the moneys at Specialty Publishers were to be spent. In addition, Laskowski and Betts promised to pay the employees all wages that were due to them. Specialty Publishers' sole shareholder also informed the company's employees that "anything pertaining to the business . . . would have to cleared with [Laskowski and Betts] because they were now managing the company." Laskowski and Betts made important decisions for Specialty Publishers such as terminating the health insurance of its employees, refusing to pay the company's rent, firing its accountant and changing the payroll system. The court determined that Laskowski and Betts "went beyond giving advice and consulting services to Specialty and . . . [became] the wage claimants' employers."

The court acknowledged that there is no bright-line rule for determining when consultants

are liable under Connecticut's wage and hour laws. However, the court explained that, under the facts presented, Venture Partners had ultimate authority and control over payment of wages. Thus, Venture Partners was held liable for the unpaid wages and, because of their control, Laskowski and Betts were held individually liable for back wages. The court also awarded double damages and attorneys fees because it determined that Venture Partners, Laskowski and Betts had acted in bad faith by refusing to pay wages.

Second Circuit Gives Guidance on "Salary Basis Test"

In Yourman v. Giuliani (10/3/2000), employees of the City of New York, the New York Health and Hospitals Corporation and the Board of Education of the City School of New York filed suit against their employers and the Mayor of New York for unpaid overtime compensation under the Fair Labor Standards Act.

The City, the HHC and the Board claimed that the employees were exempt from the overtime requirements because they were executive, administrative or professional employees who were paid on a salary basis. The employees, however, claimed that their employers engaged in a practice of deducting amounts for disciplinary reasons and, therefore, they were not paid on a salary basis.

The question for the court was whether the disciplinary pay deductions were part of an actual practice. If so, then the employers would not be paying their employees a salary. The Second Circuit wanted the lower court to determine whether the employer's practices reflect an objective intention to pay its employees on a salary basis. To determine whether the employers paid their employees on a salary basis, the Second Circuit listed five factors for consideration, including: the number of times other forms of discipline are imposed, the number of employee infractions that warrant discipline, the existence of policies favoring or disfavoring pay deductions, the process for imposing disciplinary pay deductions and the amount of discretion held by the disciplining authority to impose pay deductions. The court noted that there was no bright-line test and that there may be other relevant factors. The case was sent back to the lower court for further proceedings.

Form 5500 Filing Extension

On October 6, 2000, the Pension and Welfare Benefits Administration, the Internal Revenue Service and the Pension Benefit Guaranty Corporation issued a News Release announcing that it will allow an extension for employee benefit plans filers who are unable to file Form 5500 Annual Returns/Reports by the October 16 deadline. Filers seeking this extension must attach a statement to their filing showing reasonable cause for the delay. If reasonable cause is established, no action will be taken against the filer solely for the delay. This extension of time to file the Form 5500 and 5500-EZ is not, however, also an extension of time to file the PBGC Form 1 premium form.

For more information, please contact us

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