ROBINSON & COLE LLP
LABOR, EMPLOYMENT AND BENEFITS

eNews

E-news is an electronic newsletter reporting recent developments in labor, employment and benefits law.

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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. To view back issues, click on the "e-News Archives" link on the masthead.

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.

Company May Not Be Able To Fire Union Organizers for False Job Applications

Michael Starnes applied for a position with Hartman Brothers Heating and Air Conditioning. Unbeknownst to Hartman, Starnes was a “Salt” – a person, often paid by a union, inserted into an employer’s workforce to unionize its workers. On his job application, Starnes stated that he had been laid off by a previous employer. He also said that he had only one speeding ticket. Immediately after he was hired, Starnes revealed to Hartman’s president that he was a union organizer trying to organize Hartman’s employees. Hartman sent Starnes home. A few hours later, Hartman’s insurance carrier reported that Starnes had two speeding tickets and that it would not insure him. Hartman discharged Starnes for lying on his job application and for not being insurable.

In Hartman Brothers Heating & Air Conditioning, Inc. v. NLRB (2/6/02), the U.S. Court of Appeals for the Seventh Circuit ruled that a union organizer may lie on a job application if the lie concerns merely his status as a salt, union organizer, or union supporter and not his

qualifications for the job. The court reasoned that a lie about a person's union status or intent to organize is not material to the job application because an employer is prohibited under the National Labor Relations Act from failing to hire for those reasons. The court found that Hartman properly discharged Starnes after receiving information from its insurance carrier showing that he could not obtain coverage and so could not fulfill his duties as a driver. However, the court agreed that Hartman was required to pay Starnes $34 for the hours he was employed through the time of his termination.

Court Recognizes Age-Based Hostile Work Environment Harassment under ADEA

Deborah Alexander was over 40 years old and employed by CIT Technology Financing Services as a collector. During her employment, a manager allegedly told her "as old as you are, you should be at least a supervisor or something by now, you must be doing the wrong people. I mean the wrong thing." When Alexander explained that her daughter was ill, the manager said "you are too old to come to work with that sh-t." Her manager also said "I would like to take you home with me, but I don't do employees. I would have to fire you for the weekend. I can then take you home with me, because I have some 500 mg Viagra and I want to see how it will work." Alexander complained to management, but no action was taken. Following termination of her employment, Alexander sued for sexual harassment in violation of Title VII, age discrimination violation of the Age Discrimination in Employment Act, and retaliation. CIT sought dismissal of Alexander's ADEA claims on the grounds that ADEA does not permit recovery for age-based hostile work environment harassment.

In Alexander v. CIT Technology Financing Services, Inc. (1/17/02) the U.S. District Court in Illinois agreed with Alexander that ADEA permits age-based hostile work environment claims. The court found hostile work environment claims under ADEA to be consistent with its purpose of prohibiting arbitrary discrimination. The court also recognized that hostile work environment claims were consistent with ADEA's relationship with Title VII and the general reliance on Title VII by the courts in developing and interpreting its statutory protections. The court pointed out, however, that neither the U.S. Supreme Court nor the governing court of appeals had directly resolved the issue, and only one court of appeals had recognized that claim.

Employee Has No Right of Privacy in Laptop Computer

Albert Muick was assigned a laptop computer by his employer, Glenayre Electronics. Muick was arrested on charges of receiving and possessing child pornography. Federal law enforcement officials requested that Glenayre seize Muick's laptop computer until a search warrant could be obtained. Muick sued Glenayre claiming violation of privacy under the fourth and fifth amendments of the U.S. Constitution. In Muick v. Glenayre Electronics (2/6/02) the U.S. Court of Appeals for the Seventh Circuit ruled that Muick had no right of privacy in the laptop computer. Glenayre had adopted a policy allowing inspection of

laptops thus destroying any employee's reasonable expectation of privacy. The court noted that the laptop was not akin to a safe or file cabinet where an employee might keep private papers and establish a reasonable expectation of privacy for those items.

IRCA Does Not Bar Illegal Aliens from Receiving Workers' Compensation Benefits

Francisco Ruiz was employed as a construction worker for Belk Masonry Company when he fell 70 feet onto a concrete floor. He sustained a traumatic brain injury, a kidney contusion, and several fractures. Ruiz was an illegal alien at the time of his hire, having presented a false Social Security card and I-9 form to Belk Masonry at the time of hire. Belk Masonry challenged the award of compensation by the North Carolina Industrial Commission. In Ruiz v. Belk Masonry Company, Inc. (2/19/02), the North Carolina Court of Appeals ruled that the federal Immigration Reform and Control Act did not bar illegal aliens from workers' compensation coverage nor did it prevent illegal aliens, based solely on their immigration status, from receiving workers' compensation benefits. Belk Masonry had argued that federal law preempted North Carolina law. The court observed that the intent of IRCA was not to undermine any labor protections or to limit the powers of any federal or state labor boards. The court also noted that Belk Masonry had received the benefits of Ruiz' labor up to the time of his injury and that it would be repugnant now to deny him benefits earned from his labor.

Former Employees Must Pay $90,000 in Attorney's Fees for Filing Bogus Title VII Claim

In Stefanoni v. Board of Chosen Freeholders, County of Burlington (1/22/02) the U.S. District Court in New Jersey ordered Elizabeth and Zachary Stefanoni to pay $90,000 in attorney's fees to the County Board, the County Sheriffs Department and the Sheriff for legal fees incurred in defending against a frivolous claim of sexual harassment and retaliation under Title VII. Elizabeth and Zachary Stefanoni began working at the sheriff's office and, within two months, began an office romance. Elizabeth claimed that, while engaged in discussions in the court house, the sheriff improperly touched her breast. However, she later admitted that he was merely removing hair from the side of her mouth and had lightly brushed against her breast for contact lasting one second. Elizabeth did not report the incident to anyone and continued working. She also claimed he improperly touched her buttocks. However, she later admitted that the sheriff merely had opened an office door and attempted to guide her out by placing his hand on the small of her back for a second. During the sheriff's investigation of the sexual harassment and retaliation claims, he found evidence of substantial wrongdoing including incompetence and failure to perform duties, excessive absenteeism, unprofessional conduct, misuse of public property, misuse of cellular phones, using county buildings for improper purposes, submission of false time records and documentation for telephone calls, misuse of county telephones, failure to reimburse for personal calls and falsification of requests for military leave, impermissible outside employment, and improperly engaging in secondary employment while calling in sick.

Court Allows FMLA Claim for Employee Fired for Camping at 4-H Fair while on Leave

Audeana Connel worked for Hallmark cards for 24 years. For many years, she was active in 4-H programs and she and her family had camped at the county fair each year. In 1999, Connel was on FMLA leave during the week of the fair. But she attended the fair and camped at the fairground. Her co-workers complained.

In 2000, Connel told her supervisor she would use her remaining vacation time for her daughter's wedding. She also told her supervisor that she wanted to take time off for the fair. Days before the fair began, Connel called in sick with severe migraine headaches and suggested that she would be missing the fair because of her illness. Connel completed FMLA paperwork requesting leave for one almost one month. A Hallmark manager photographed Connel at the fair where she camped and attended fair activities for the entire week.

Connel was asked to account for her time on leave. During a meeting with Hallmark's human resources manager, Connel admitted that she attended the fair on one evening but denied attending the fair on any other evenings and denied camping at the fairgrounds. While on FMLA leave, Hallmark was paying Connel short term disability payments. Hallmark determined that the STD payments should be terminated. When Hallmark stopped her STD pay, Connel returned to work. But Hallmark did not request a fitness for duty release as required by its FMLA policies. The following month, Connel's employment was terminated for fraud including misleading her supervisor when Connel suggested she would miss the fair because of her illness, lying to Hallmark's human resources manager when she denied attending and camping at the fair, attending the fair when her doctor had not authorized those activities, and attending the fair when claiming to be too sick to work. Connel sued Hallmark for wrongful termination and retaliation under the Family and Medical Leave Act.

In Connel v. Hallmark Cards, Inc. (2/15/02) the U.S. District Court for Kansas rejected Connel's arguments that Hallmark went on a "witch hunt" to catch her at the fair, that she was "trapped" into making false statements to Hallmark's human resources manager, and that Hallmark was "building up a file" to justify their termination. However, the court accepted Connel's argument that stopping her STD pay was intended to punish her for being at the fair while on FMLA leave. Although the court believed stopping STD pay was legally permissible, it noted that a jury could find that stopping STD pay was intended by Hallmark to interfere with Connel's exercise of her FMLA rights. The court also noted that stopping STD pay and forcing her to return to work violated Hallmark's own policies that required an employee returning to work to obtain a fitness for duty release.

Massachusetts Employment Contract Signed on a Sunday Ruled Invalid

Frank Grondolsky drove from his home in Connecticut to Massachusetts where he signed a contract of employment with Costello Dismantling Company. The contract provided for a minimum term of employment of two years. Four months later, Costello fired Grondolsky. Grondolsky sued in Connecticut for breach of contract and other claims. Costello sought dismissal of all claims on the grounds that the contract of employment was void under Massachusetts law because it was signed on a Sunday. In Grondolsky v. Costello (12/20/01) the Connecticut Superior Court dismissed Grondolsky's claims finding that Massachusetts has a statute, Massachusetts General Laws ch. 136, sec. 5, that renders employment contracts made on a Sunday in Massachusetts illegal and unenforceable.

New Toll Free Telephone Number for Questions on Retirement and Health Benefits

Labor Secretary Elaine Chao issued a Press Release (2/11/02) announcing a new Toll Free Participant and Compliance Assistance Number – 1-866-275-7922 – for workers and employers to obtain answers to questions about retirement and health benefits. Callers will be linked automatically to the Pension and Welfare Benefits Administration regional office covering the caller.

IRS Issues Announcement on Frequent Flyer Miles used for Business Travel

The U.S. Internal Revenue Service issued Announcement 2002-18 noting that, consistent with prior practice, the IRS will not assert that any taxpayer has understated federal tax liability by reason of receipt or personal use of frequent flyer miles or other in-kind promotional benefits attributable to the taxpayer's business. The relief does not apply to travel or other promotional benefits converted to cash, to compensation paid in the form of travel or other promotional benefits, or in circumstances where these benefits are used for tax avoidance. This Announcement is scheduled to appear in IRS Bulletin 2002-10 dated March 11, 2002.

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