Date Issued: 07/30/2001

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.

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.

Nurses Not Entitled to Minimum Wage for On-Call Time

In Reimer v. Dakota Heartland Health Systems (7/16/2001) the U.S. Court of Appeals for the Eighth Circuit ruled that Dakota Heartland was permitted to pay its nurses and other employees less than the federal minimum wage for off-premises on-call time. The nurses, in a class action lawsuit, claimed that they were entitled to be paid at least minimum wage for on-call time under the Fair Labor Standards Act. The court noted that an employee's time is work under the FLSA if the time is spent predominantly for the benefit of the employer. In finding that the nurses' off-premises on-call hours were not spent predominantly for the benefit of the employer, the court noted that there were very few restrictions placed on the nurses during their on-call hours. The court explained that on-call nurses had a great deal of flexibility in their activities. They were required to be reachable by cellular phone or beeper or by leaving a telephone number where they could be contacted. If called, they had to report to the hospital within twenty minutes. They were also prohibited from using alcohol or mind-altering drugs. Otherwise, the on-call nurses could do whatever they wished during on-call time. They were not required to be at the hospital or their homes. They could play

sports, work at home, go shopping or visit friends.

Harassment of Male Employee for Acting Effeminate Violates Title VII

Antonio Sanchez worked as a food server in a restaurant owned by Azteca Restaurant Enterprises. Throughout his employment, Sanchez endured a relentless campaign of insults, name-calling and vulgarities. Male co-workers and a supervisor repeatedly referred to Sanchez in Spanish and English as "she" and "her." Male co-workers mocked Sanchez for walking and carrying his serving tray "like a woman" and taunted him in Spanish and English, calling him, among other things, a "Fa-got" and "F---ing female wh-re." Those remarks occurred at least once a week and often several times a day. Sanchez complained to management and conditions improved. A few months later, Sanchez was involved in a dispute with a manager and walked off the job. Azteca terminated Sanchez for leaving work early.

Sanchez sued Azteca for discrimination on account of sex in violation of Title VII. Sanchez asserted that the verbal abuse was based on a perception that he is effeminate and, as a result, occurred because of his sex. He contended that he was harassed because he failed to conform to a male stereotype. In Sanchez v. Azteca Restaurant Enterprises, Inc. (7/16/2001), the U.S. Court of Appeals for the Ninth Circuit ruled that the sustained campaign of taunts directed at Sanchez and designed to humiliate and anger him was sufficiently severe and pervasive to alter the terms and conditions of his employment. The court noted that the verbal abuse directed at Sanchez reflected a belief that Sanchez did not act as a man should act. As a result, the verbal abuse suffered by Sanchez was determined to be on account of his gender.

53-Page Performance Evaluation Is an Adverse Job Action

Larry Phillips worked as a social service worker for the Missouri Department of Social Services. As part of his job, he recruited, interviewed and licensed potential foster parents. Phillips and his supervisor, Cathy Collings, disagreed about the licensing of foster parents with alternative lifestyles such as homosexuals, unmarried couples and persons involved in extra-marital affairs. Phillips told Collings that his religious beliefs did not permit him to license certain persons as foster parents, including those living in an openly homosexual relationship. Phillips explained to Collings' supervisor that his religion taught him that homosexuality was an abomination and that his beliefs prevented him from approving homosexuals as foster parents. Collings authored a performance evaluation of Phillips and suggested that he be terminated. After the evaluation was revised by other managers, the recommendation of termination was changed to needs improvement. The four-page evaluation evolved into a 53-page evaluation that criticized virtually every aspect of Phillips' job performance. The evaluation did not follow a traditional format and was the longest evaluation that Phillips had ever received. It also contained extensive corrective action plans and required remedial training.

Phillips sued Collings for religious discrimination and harassment. After a trial, a jury awarded $1,500 in compensatory damages and $25,000 in punitive damages. In Phillips v. Collings (7/19/2001), the U.S. Court of Appeals for the Eighth Circuit ruled that the 53-page evaluation that included corrective action plans and remedial training was an adverse employment action. Although a poor performance evaluation typically does not constitute an adverse employment action, a 53-page evaluation critiquing nearly every aspect of Phillips' performance was so extraordinarily negative that it altered the terms and conditions of his employment.

Employer Not Required to Conduct Perfect Investigation before Terminating Employee

In Braithwaite v. Timken Company (7/18/2001), the U.S. Court of Appeals for the Sixth Circuit ruled that Timken properly terminated Harold Braithwaite for fighting. Braithwaite, an African-American, worked in Timken's plant making roller bearings. Braithwaite asserted that he argued with another employee, but that they did not fight. In contrast, other employees provided statements to Timken that Braithwaite threatened another employee and shoved the employee several times before other workers separated them. Braithwaite filed a lawsuit claiming he was terminated on account of his race. In response to Timken's assertion that Braithwaite was terminated for fighting, Braithwaite alleged that the termination was pretextual because management ignored statements from other employees proving that he did not fight, management discouraged other employees from giving statements supporting Braithwaite and management did not allow him to present his version of the altercation. The court ruled that Timken conducted a reasonable investigation under the circumstances and was entitled to rely on its conclusion that Braithwaite fought with and threatened another employee. Accordingly, the court dismissed Braithwaite's claim.

ADA Reasonable Accommodation Does Not Require Promotion of Disabled Employee

William Lucas worked as a material handler at W.W. Grainger, Inc. Lucas injured his back while unloading a trailer. Upon returning to work, his doctor restricted him to lifting less than ten pounds and to refrain from repetitive bending. Lucas performed office work on a temporary basis, displacing two employees to accommodate his disability. He soon developed a degenerative disk disease and lumbar disk syndrome in his back and requested an accommodation in the form of a permanent job that entailed only deskwork. There were no desk jobs available and Lucas was not qualified for any other positions. Lucas was placed on workers' compensation leave until, a few months later, he began working for another company.

Lucas sued Grainger under the Americans with Disabilities Act claiming that Grainger refused to accommodate his disability. In Lucas v. W.W. Grainger, Inc. (7/17/2001) the U.S. Circuit Court of Appeals for the Eleventh Circuit ruled that Grainger was not required to promote Lucas in order to accommodate him. Grainger noted that all of the positions

identified by Lucas as desk jobs that would accommodate his condition were regarded by Grainger employees as promotions.

No ADA or FMLA Claim by Mother Caring for AIDS-Stricken Son

Rosemary Wascura worked as the city clerk for the City of South Miami. Wascura's 27-year-old son, who was experiencing the end stages of AIDS, moved in with Wascura and her family. She notified the City about her son's illness and the possibility that she may need to take time off from work to care for him. Within several months, the City asked Wascura to resign immediately and suggested that, if she needed an excuse, she could "use what's going on at home." Wascura refused and a short time later she was terminated. Wascura alleged discrimination in violation of the Americans with Disabilities Act and the federal Family and Medical Leave Act. In Wascura v. City of South Miami (7/17/2001), the U.S. Court of Appeals for the Eleventh Circuit ruled that the close temporal proximity between the date Wascura notified the City of her son's illness and the date of her termination did not, standing alone, show that the City's reason for terminating her was pretextual. The evidence showed that the City was concerned about Wascura's ability to do her job, her integrity, several incidents where she sold items while at work, and an incident where she purchased items and charged them to a City account. The court noted that the evidence showed that the City expressed sympathy for her situation and that there was no evidence of any discriminatory animus with respect to her association with her diseased son. Accordingly, the court affirmed dismissal of her claims.

No Attorney-Client Privilege for Documents Shown to HR Consultant

First Union Corporation reduced its workforce by more than 2,000 employees. As part of the reduction, First Union paid terminated employees enhanced benefits contingent upon their signing a release. A group of employees filed a class action lawsuit under the Age Discrimination in Employment Act claiming that the releases were crafted to mislead employees into believing they had waived their rights to sue under ADEA. Apparently, the releases were knowingly prepared so as not to comply with the provisions of the Older Workers Benefit Protection Act.

As part of its investigation, the former employees sought to obtain documents from First Union's reorganization consultant, a non-lawyer, who reviewed documents prepared by First Union's attorneys and attended meetings with the attorneys. In Kaminski v. First Union Corporation (7/10/2001) the U.S. District Court in Pennsylvania ruled that First Union must turn over all communications revealed by First Union's attorneys to the human resources consultant notwithstanding the fact that the consultant signed a confidentiality agreement. In ruling that the documents must be turned over to the former employees, the court noted that, although First Union and its attorney included the consultant as part of its legal team, the consultant was not an attorney, did not provide any legal advice and did not assist the attorney in providing legal advice. Accordingly, the court found that First Union

had waived its right to protect those documents from disclosure under the attorney-client privilege.

For more information, please contact us

Stephen W. Aronson	Andrew S. Golden	Peter J. Moser
860-275-8281	860-275-8309	617-557-5923

ROBINSON & COLE LLP
Boston - Hartford - New London - Stamford - Greenwich - New York

Visit our Labor, Employment and Benefits Practice website at www.rc.com