ROBINSON & COLE LLP
LABOR, EMPLOYMENT AND BENEFITS

e-News

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.

Employee May Use Vacation Time to Qualify for FMLA Leave

Robert Ruder left work for medical reasons twelve days shy of his one year anniversary of working for MaineGeneral Medical Center. At that time, he had two weeks of unused vacation time. Ruder requested leave under the Family and Medical Leave Act. MaineGeneral denied his request but permitted him to take a medical leave of absence. When Ruder reported for work at the end of his approved medical leave, MaineGeneral terminated his employment. Ruder sued MaineGeneral for violating the ADA by denying his request for FMLA leave, failing to reinstate him upon his return from leave, and terminating his employment.

MaineGeneral asked the court to dismiss Ruder's claims on the ground that he was not eligible for FMLA leave because he had not worked a minimum of twelve months at the time he applied for leave. In support, MaineGeneral relied on a U.S. Department of Labor regulation that instructs that the determination of eligibility must be made at the time leave

commences. However, in Ruder v. MaineGeneral Medical Center (5/10/02) the U.S. District Court for Maine permitted Ruder to use his accrued vacation time to achieve the required one year of employment and qualify for protection under the FMLA. The court explained that another regulation expressly permits vacation or other unpaid leave to count toward the one year period. The court noted that the regulation did not restrict Ruder from using vacation leave at any time during his employment, even at the conclusion of his employment. Accordingly, the court refused to dismiss Ruder's FMLA claims.

Fee-Splitting Arbitration Agreement Ruled Unenforceable

In McCaskill v. SCI Management Corporation (4/4/02) the U.S. Court of Appeals for the Seventh Circuit ruled that an arbitration agreement was unenforceable because it required the employee and the employer to pay their own attorney's fees, regardless of the outcome of the arbitration. Gloria McCaskill filed a lawsuit against SCI alleging that she was terminated in violation of Title VII after she forwarded complaints of sexual harassment from her subordinates to her supervisor, the alleged harasser. SCI tried to dismiss the lawsuit, arguing that the dispute must be resolved under the arbitration agreement signed by McCaskill. The trial court dismissed the lawsuit and McCaskill appealed. In reversing the trial court's decision, the appeals court explained that an employee's right to attorney's fees is integral to the purposes of Title VII and important to remedy and deter discrimination. An arbitration agreement that does not allow an employee to recover attorney's fees thus thwarts the purposes of Title VII.

Barring Employee from Speaking with Attorney before Mental Exam States ADA Retaliation Claim

Don Jackson worked for Lake County, an Illinois municipal corporation. He had never been diagnosed with, nor sought medical treatment for, any mental health problem or mental disease. One evening, Jackson received a message from a psychologist informing him of an appointment two days later. The next day, Lake County's superintendent told Jackson that Lake County made an appointment for him to have a mental examination, but did not indicate the scope or purpose of the examination. Jackson responded to the supervisor that he wanted to discuss his rights with an attorney before submitting to the examination. Jackson was unable to meet with his employment attorney before the appointment and so rescheduled the examination. In response, the supervisor suspended Jackson without pay until he submitted to the examination. Lake County terminated Jackson's employment three months later. Jackson sued Lake County, alleging that Lake County retaliated against him in violation of the ADA because he sought legal advice and attempted to consult with an attorney before submitting to the examination.

In Jackson v. Lake County (4/30/02) the U.S. District Court in Illinois refused to dismiss Jackson's retaliation claim against Lake County. The court explained that a jury could conclude that Jackson apprised Lake County that he thought its request for a blanket mental examination was a violation of his rights under the ADA. The court also explained that

Jackson clearly exercised his right to speak with an attorney about his rights under the ADA. Finally, the court noted that Lake County apparently tried to intimidate him by suspending him without pay for refusing to submit to the exam before he could consult with an attorney.

Court Abstains from Considering Sexual Harassment Claim against Church

Lee Ann Bryce worked at St. Aidan's Episcopal Church as its Youth Minister. She had a civil commitment ceremony with her partner, an ordained minister at another church. Following the ceremony, St. Aidan's informed Bryce that she would be terminated in accordance with church doctrine, which required that people be married and faithful or single and celibate. St. Aidan's leaders notified their congregation that Bryce was a lesbian and that her homosexuality was a sin, rendered her unfit to work with children, caused her to be promiscuous, was part of demonic forms of idolatry, and caused loathsome diseases. A church meeting was held to discuss the congregation's reactions. The following year, Bryce was terminated. She and her partner filed a lawsuit alleging sexual harassment in violation of Title VII.

In Bryce v. Colorado District Church of the Nazarene (4/30/02) the U.S. Court of Appeals for the Tenth Circuit affirmed the dismissal of their claims, explaining that the church's actions were part of ecclesiastical discussions on church policy toward homosexuals and that, accordingly, those actions were protected under the First Amendment of the U.S. Constitution. The appeals court also noted that, while Bryce and her partner found the comments made by the church offensive, there were comments made by Bryce and her partner that parishioners found equally offensive. The appeals court also commented that the meetings served to facilitate discussions within the church about sexual practices and served to help educate and inform parishioners about church doctrine.

Emotional Distress Claim against Supervisor Proceeds to Trial

Elizabeth Brooks worked as a hostess at a Denny's Restaurant in Pennsylvania. As she was leaving at the end of her shift, the restaurant's general manager, Christopher Mendoza, allegedly taunted Brooks with a vibrator in his pants, pursued Brooks around the restaurant despite her protests, and uttered obscene remarks to her. After reporting the incident to Denny's district manager, Brooks was transferred to another restaurant. The following month, Denny's terminated Brooks.

Brooks sued Mendoza for both negligent and intentional infliction of emotional distress and sued Denny's Restaurant for sexual harassment and retaliation in violation of Title VII. Mendoza and Denny's filed motions to dismiss all of her claims, but the court refused. Mendoza and Denny's then asked the court to reconsider its decision, arguing that there is a distinction between the claims for *intentional* infliction of emotional distress and for *negligent negligent* infliction of emotional distress. They argued that Brooks' negligent infliction of

emotional distress claim was barred under the Pennsylvania workers' compensation laws. In Brooks v. Mendoza (3/25/02) the U.S. District Court for Pennsylvania agreed that Brooks' negligent infliction of emotional distress claim was barred by the Pennsylvania workers' compensation laws. But the court ruled that Brooks' intentional infliction of emotional distress was personal to Mendoza and sufficiently disconnected from the employer-employee relationship. Accordingly, the Pennsylvania workers' compensation laws did not bar that claim.

Polygraph Examiner Not Liable under Federal Polygraph Act

In Calbillo v. Cavender Oldsmobile, Inc. (4/25/02) the U.S. Court of Appeals for the Fifth Circuit ruled that a polygraph examiner was not liable under the federal Employee Polygraph Protection Act because he was not involved in the decision to polygraph an employee and was not hired to provide guidance on compliance with the provisions of the EPPA. Selestino Calbillo, a parts counter technician for Cavender, was accused of stealing. Cavender hired Donald Trease, a private investigator and polygraph examiner, to investigate the theft. The general manager of Cavender asked Trease to submit Calbillo to a lie detector test. Calbillo failed the test and was terminated. Calbillo sued Cavender and Trease's company for violating the EPPA. The trial court dismissed the EPPA claims and Calbillo appealed. The appeals court affirmed dismissal of all claims against Trease's company because he was not an "employer" under the EPPA. The appeals court explained that Trease was not involved in the decision to polygraph Calbillo, did not provide expertise or advice to Cavender on compliance with the EPPA's requirements or the dealership did not rely on him to ensure compliance, and merely reported the results of the polygraph examination to the employer and was not otherwise involved in the disciplinary action.

EEOC Reports Increased Filing of Charges by Muslims, Arabs, South Asians, and Sikhs and Releases Fact Sheets on Workplace Rights and Employer Responsibilities

The U.S. Equal Employment Opportunity Commission issued a Press Release (5/15/02) reporting that, between September 11, 2001 and May 7, 2002, 497 charges were filed by Muslims, Arabs, South Asians, and Sikhs -- 304 more than were filed during the comparable period one year ago. In response, the EEOC issued two new fact sheets addressing workplace issues concerning the rights and responsibilities of employees and employers on the treatment of Muslims, Arabs, South Asians, and Sikhs. The Questions and Answers for Employers covers employer responsibilities concerning hiring, harassment, religious accommodation, temporary assignments, and background investigations. The Questions and Answers for Employees covers hiring and discharge, harassment, and religious accommodation from the employee's perspective.

R&C's HIPAA Compliance Team Launches Home Page on rc.com

Visit rc.com to learn about Robinson & Cole's HIPAA Compliance Team. The website

offers information about the federal Health Insurance Portability and Accountability Act. It also describes the HIPAA Compliance Team's program for comprehensive HIPAA analysis, compliance, and training for employers, hospitals, group health plans, managed care organizations, and insurers. To learn more about Robinson & Cole's HIPAA program, please contact either of our HIPAA Compliance Team leaders, Felicia DeDominicis and Bruce Barth.

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