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.

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U.S. Supreme Court Rules that Employment Discrimination Plaintiffs Are Not Required to Plead Specific Facts Showing Discrimination

Akos Swierkiewicz, a 53-year-old native of Hungary, filed a federal court complaint alleging that Sorema N.A. unlawfully terminated his employment of on account of his national origin and his age in violation of Title VII and the Age Discrimination in Employment Act. The trial court dismissed the complaint because it failed to plead specific facts showing discrimination. Swierkiewicz appealed but the U.S. Court of Appeals for the Second Circuit affirmed the dismissal. Swierkiewicz appealed to the U.S. Supreme Court.

In Swierkiewicz v. Sorema N.A. (2/26/02), the Supreme Court ruled that an employment discrimination complaint need not contain specific facts showing discrimination, but instead must contain only a short and plain statement showing that the plaintiff is entitled to relief. The Supreme Court explained that to establish a case of employment discrimination a plaintiff must offer evidence proving (1) membership in a protected class, (2) qualification

for the job in question, (3) an adverse employment action, and (4) circumstances supporting an inference of discrimination. But there is no requirement that the plaintiff must plead that evidence in the complaint. The Supreme Court stated that a court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations of the complaint.

Failure to Adopt Anti-Discrimination Policy or Provide Anti-Discrimination Training Subjected Company to Punitive Damages in Title VII Claim

Tortica Anderson successfully sued her former employer, G.D.C., Inc., a trucking firm, for sexual harassment in violation of Title VII. Anderson showed that she was subjected on a daily basis to vulgar and humiliating verbal assaults of a sexual nature by G.D.C.'s general manager and other male employees, and that after complaining of such conduct, she was told to get used to it because that was the way of G.D.C. The jury awarded Anderson compensatory damages, but the trial court denied her claim for punitive damages. In Anderson v. G.D.C., Inc. (2/25/02), the U.S. Court of Appeals for the Fourth Circuit reversed the trial court's decision, ruling that punitive damages were appropriate because G.D.C. failed to engage in good faith efforts to comply with Title VII. More specifically, G.D.C. never adopted any anti-discrimination policy, nor did it provide any training whatsoever on the subject of discrimination. The Court of Appeals additionally noted that the mere display of the EEOC poster regarding discrimination and sexual harassment did not constitute a good faith effort to forestall potential discrimination or to remedy any that might occur.

Company's Withdrawal of Recognition of Union Ruled Improper

Iron Workers Local 733 was the certified bargaining representative of employees at Scepter, Inc., an aluminum recycling plant. Scepter and the union began negotiating a collective bargaining agreement. Approximately a year later, the negotiations had essentially ceased because, according to Scepter, the lead union negotiator refused to address several matters. Shortly thereafter, a frustrated member of the union's negotiating team told Scepter managers that she believed Scepter's employees no longer wanted the union to represent them. Scepter consequently withdrew its recognition from the union as its employee's collective bargaining agent and made unilateral changes in mandatory subjects of bargaining such as wages and health benefits. In Scepter, Inc. v. NLRB (2/22/02), the U.S. Court of Appeals for the District of Columbia held that Scepter's withdrawal of recognition of the union violated the National Labor Relations Act, reasoning that expression by a single employee of her belief that the union was no longer the choice of employees constituted inadequate evidence of loss of majority support. Accordingly, Scepter failed to demonstrate a genuine, reasonable uncertainty, grounded in objective considerations, that the union enjoyed majority support.

Racial Epithets Regarding Employee's Boyfriend Gives Rise to Racial Harassment Claim

April Landers worked in the skinning room of a slaughterhouse owned by Quality Pork Processors, Inc. Landers, who is white, dated a former Quality Pork employee, Bill Matlock, who is black. According to Landers, two of her coworkers routinely made racially derogatory comments to her regarding Matlock, such as calling Landers "n----r lover" and asking her questions such as "how is your n----r doing?" Landers claimed that she asked the coworkers to stop, but they just laughed and that, as a result, she would often cry in the restroom during her breaks. Landers claimed she additionally complained about the racial comments to her supervisor, who allegedly did nothing to investigate and told Landers that the coworkers were "just boys."

In EEOC v. Quality Pork Processors, Inc. (2/1/02), the U.S. Equal Employment Opportunity Commission sued Quality Pork on Landers' behalf for racial harassment in violation of Title VII. Quality Pork moved to dismiss the claim on the basis that the racially derogatory language was aimed at Matlock rather than at Landers, that only two of more than one hundred employees on Landers' shift made remarks, that Landers was not physically threatened or harassed, that her work performance apparently did not suffer, and that she could avoid the offending employees simply by not paying attention to them. The U.S. District Court for Minnesota rejected these arguments and allowed the lawsuit to proceed. The court explained that, while the racial epithets may not have referred to Landers, they were intentionally directed at her and, accordingly, created a racially hostile work environment for her. The court was additionally persuaded by management's inappropriate responses to Landers's complaints.

Grocery Store Agrees to Pay $90,000 Damages to Teenage Employee Fired for HIV Infection

Korrin Krause, age 15, was hired as a part-time bagger at Quality Foods IGA. Three weeks after her hiring, Quality Foods learned that Krause was HIV positive and immediately terminated her employment. The store manager told Krause's mother that her daughter's HIV infection posed a danger to the store's customers and to other employees. In EEOC v. Schofield Foods, Inc. (2/1/02), the U.S. Equal Employment Opportunity Commission, on behalf of Krause, sued the grocery store for allegedly violating the Americans with Disabilities Act. The parties reached a settlement in which Quality Foods agreed to pay Krause $1,000 in lost wages and $89,000 in emotional distress damages. Quality Foods also agreed to provide training on the ADA to its managers and supervisors.

Admission of "Subjective Evaluation Criteria" Insufficient to Show Discrimination or Pretext

Gary Millbrook, a black janitor at IBP, Inc., claimed that he was passed over for a promotion in favor of other candidates on eight separate occasions because of his race.

Millbrook sued IBP for discriminating against him in violation of Title VII. At trial, an IBP manager stated that IBP had passed Millbrook over on one occasion because the other candidate, based on "subjective evaluation criteria," was better qualified. The jury awarded Millbrook $7,400 in pain and suffering, $25,000 in lost wages, and $100,000 in punitive damages. The court accepted the verdict and ordered IBP to instate Millbrook in the advanced position and awarded him attorney's fees. IBP appealed. In Millbrook v. IBP, Inc. (2/20/02), U.S. Court of Appeals for the Seventh Circuit reversed, ruling that IBP was entitled to judgment because Millbrook failed to present any evidence calling into question the truthfulness of IBP's explanation for hiring the other candidates. The appeals court explained that the manager's admission that the decision was based on subjective evaluation criteria constituted insufficient evidence of discrimination or pretext. The appeals court also noted that pretext means a lie, specifically, a phony reason for some action, and the evidence did not support that conclusion.

EEOC Issues Statistics for Fiscal Year 2001

The U.S. Equal Employment Opportunity Commission issued a Press Release and Enforcement Enforcement and Litigation Statistics (2/22/02) for Fiscal Year 2001 (October 1, 2000 to September 30, 2001). According to the EEOC, the total number of discrimination charges filed against private employers increased 1% to 80,840 claims, which constitutes the highest level since the mid-1990s. A breakdown of the claims by category of discrimination is as follows:

· Race – 35.8%
· Sex/Gender – 31.1%
· Retaliation – 27.5%
· Age – 21.5%
· Disability – 20.4%
· National Origin – 9.9%
· Religion – 2.6%
· Equal Pay – 1.5%

The number of discrimination cases based on age and disability showed slight increases in comparison to Fiscal Year 2000, while all other types of charges either declined slightly or remained level. EEOC Chair Cari Dominguez made the following comment on this point, "The incidence rate of age and disability discrimination appears to be on the rise with the graying of America. Employers must be vigilant in preventing such characteristics being factored into their employment decisions."

IRS Proposes New Regulations on Golden Parachutes

The U.S. Internal Revenue Service has issued Revised Proposed Regulations governing golden parachute payments made to corporate executives in the event of a corporation's

change of control. Payments made to a disqualified person in an amount equal to at least three times a disqualified person's base compensation amount are classified as golden parachute payments and subject to an excise tax. The proposed regulations would set forth who is a disqualified person, when there is a change of control, how excess parachute payments are calculated, and when the 20% excise tax on excess parachute payments applies. The regulations would narrow the definition of disqualified person by excluding an owner of $1,000,000 worth of a corporation's stock as a per se disqualified person. In addition, the regulations would require closely held businesses to obtain approval of all golden parachute payments by 75% of the business' shareholders after providing adequate disclosure of all material facts surrounding the parachute payments to all shareholders in order to avoid being subject to the excise tax. Finally, the regulations would expand the types of payments that will be considered golden parachute payments by clarifying when a group would be considered to own more than half the total value of a corporation for determining change of control.

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