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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U.S. Supreme Court Invalidates FMLA Regulation Penalizing Employers for Failing to Designate Leave

Tracy Ragsdale had worked for Wolverine World Wide for about a year when she was diagnosed with cancer. She requested, and was granted, medical leave for thirty weeks. During her leave, Wolverine kept Ragsdale's position open, maintained her benefits, and paid her health insurance premiums. Ragsdale requested a further thirty-day leave. Wolverine denied her request and terminated her employment. Ragsdale sued, claiming Wolverine violated the Family and Medical Leave Act. She argued that since Wolverine never designated her thirty weeks of leave as FMLA leave, as required by an FMLA regulation, she was entitled to twelve additional weeks of leave. Wolverine conceded it had not notified Ragsdale that her leave would count towards FMLA leave, but contended that the regulation unlawfully expanded the FMLA and that it had complied with the FMLA by granting her thirty weeks of leave. InRagsdale v. Wolverine World Wide, Inc. (3/19/02) the U.S. Supreme Court invalidated the FMLA regulation, ruling that it improperly converted

the FMLA's requirement that employers offer a minimum of twelve weeks of leave into an entitlement of an additional twelve weeks of leave, unless the employer notifies the employee that the leave is counted as FMLA leave.

U.S. Supreme Court Upholds EEOC Regulation on Filing Unverified Complaints

Five months after being denied tenure by Lynchburg College, Leonard Edelman faxed a letter to the regional office of the U.S. Equal Employment Opportunity Commission claiming the College discriminated against him on account of his gender, religion, and national origin. Edelman did not file a verified complaint (one signed under oath or affirmation) until after the EEOC's 300-day filing period had expired. When Edelman later sued the College in federal court for violating Title VII, the College pointed to Edelman's late filing of the verified complaint and succeeded in getting the trial court to dismiss his case. Edelman appealed, relying on an EEOC regulation allowing for a verification to relate back to an earlier complaint. Edelman contended that his timely faxed letter should serve as the complaint and that his later verification should relate back to the timely complaint. In Edelman v. Lynchberg College (3/19/02), the U.S. Supreme Court agreed with Edelman and upheld the EEOC regulation allowing relation-back. The Court explained that the verification was required by the time the College needed to respond to the complaint. The Court remanded the case to the lower court to decide whether Edelman's faxed letter could serve as a complaint.

Individuals Are Not Liable under Connecticut's Anti-Discrimination Law

Michael Perodeau, Sr., a Hartford police officer, claimed that he was transferred to an unfavorable assignment after his supervisor falsely reported that he had refused nine callbacks in the last six months of 1997. A callback is a request to return for an unscheduled shift after completing a scheduled shift. Perodeau, a single parent, alleged that he was treated differently than other employees, such as females or single mothers, who refused callbacks. He sued the City of Hartford and four individual officers, alleging age and sex discrimination under Connecticut's Fair Employment Practices Act. Although Perodeau sued in federal court, in the absence of controlling legal authority the federal court asked the Connecticut Supreme Court to decide whether Connecticut's FEPA allowed for personal liability for discrimination.

In Perodeau v. City of Hartford (3/26/02), the Connecticut Supreme Court decided there is no individual liability for discrimination under the FEPA. After examining federal cases that rejected individual liability under federal anti-discrimination statutes, the court found that the term "employer" as used in the FEPA applied to employers of three or more employees and not to individuals working for employers.

The court also ruled that Connecticut's workers' compensation laws did not bar negligent infliction of emotional distress claims against individuals, but it excluded claims for conduct

occurring in an ongoing employment relationship. The court recognized that employees reasonably should expect to experience emotional distress in the workplace and allowing those claims would permit employees to use the threat of a lawsuit to influence the conduct of the employer and would open the courts to spurious claims.

Court Must Decide Whether Employee Can Afford Costs Before Enforcing Arbitration Agreement

Diane Blair resigned and sued her former employer, Scott Specialty Gases, for discrimination and sexual harassment in violation of Title VII. During her employment, Blair received an employee handbook containing a mandatory arbitration provision and signed an acknowledgement agreeing to submit any employment dispute to arbitration. Those documents required that Blair pay one-half of the arbitration expenses. Scott sought to dismiss the lawsuit, arguing that Blair was required to arbitrate her claims instead of suing in court. The lower court agreed with Scott and rejected Blair's argument that the arbitration agreement was unenforceable because it required her to pay one-half of the costs. Blair appealed. In Blair v. Scott Specialty Gases (3/13/02) the U.S. Court of Appeals for the Third Circuit ruled that, before ordering a case to arbitration, the employee must be afforded an opportunity to show whether the costs would prohibit the employee from vindicating his or her rights. The appeals court returned the case to the lower court to determine the costs of arbitration, such as the rates for the arbitrator, the administrative fees, the anticipated length of the arbitration, and the witness fees, compared to Blair's ability to pay one-half of those expenses, particularly if she was unemployed.

Employer Cannot "Slavishly Defer" to Medical Opinion when Rejecting Disabled Job Applicant

Kelly Gillen was born with a genetic deformity: her left arm ended a few inches below her elbow. She was also missing her left hand. After passing a state Emergency Medical Technician certification exam, Gillen applied for an EMT job with Fallon Ambulance Service. Fallon offered Gillen the job, contingent on her passing a medical examination.

The medical examination was conducted by Milton Hospital, which had long been the principal provider of health services to Fallon's employees. Fallon's doctor decided to give Gillen an additional strength test before clearing her for the job. The hospital's medical director did not examine Gillen or perform the strength test, but he concluded that a one-handed female could not perform the essential functions of the EMT job and failed Gillen's pre-employment exam. After undergoing a weightlifting regimen and passing a strength test, Gillen got a job at another ambulance service where she worked as an EMT without incident.

Gillen sued Fallon for disability discrimination in violation of the Americans with Disabilities Act. The trial court dismissed Gillen's claim, finding that she was not disabled as she was not substantially limited in the activity of "lifting" as demonstrated by her

successful employment as an EMT. On appeal, the U.S. Court of Appeals for the First Circuit in Gillen v. Fallon Ambulance Service, Inc. (3/19/02) disagreed with the trial court. The appeals court explained that the key question was not whether a handicapped person accomplishes her goals, but whether she encountered significant handicap-related obstacles in doing so. The appeals court ruled that Gillen was disabled under the ADA, reasoning that her missing hand was more of an impairment than an inability to lift a certain weight and that the manual tasks that most people do with both hands Gillen must do with one.

As to the medical opinion relied on by Fallon in not hiring Gillen, the appeals court cautioned that a physician's endorsement does not provide complete insulation from an ADA claim and that an employer cannot "slavishly defer" to a medical opinion without first assessing the reasonableness of the physician's conclusions. In Gillen's case, the medical director who failed Gillen in her pre-employment examination did not fully examine her and his opinion was unsupported. The appeals court returned the case to the lower court for trial.

Dental Ailment Was Not a Serious Medical Condition under the FMLA

Yvette Flanagan, who had a poor attendance record, chipped a tooth that later became abscessed and had to be extracted. Flanagan also developed a condition called dry socket. In the four weeks after Flanagan chipped her tooth, she saw her dentist or oral surgeon seven times, usually during work hours. She called in sick, claiming that she would not be able to work that day due to the side effects of her pain medication. When she failed to report to work her employer, Keller Products, terminated her employment for attendance problems. Flanagan sued Keller Products for violating the Family and Medical Leave Act.

Flanagan claimed that her dental condition entitled her to FMLA leave. In Flanagan v. Keller Products, Inc. (2/25/02) the U.S. District Court for New Hampshire explained that the FMLA specifically excludes routine dental ailments unless they qualify as a serious medical condition. The court found that Flanagan's chipped tooth and related complications were not a serious medical condition and did not afford her FMLA protection. Accordingly, the court ruled that her termination did not violate the FMLA.

Massachusetts Considering Law Imposing Criminal Sanctions against Employers for Employee Abuse of Minors

In an apparent response to the sexual abuse scandal by church clerics, Massachusetts senators Marian Walsh, Richard Moore and Patricia Walrath have introduced a bill entitled, "An Act Protecting Children from Physical and Sexual Abuse" (Senate Bill, No. 2266). The bill provides for criminal sanctions against employers that allow a child to be abused by recklessly hiring, retaining, or supervising an employee whom the employer knows will interact with children thereby exposing them to a risk of abuse.

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