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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FMLA Protects Former Employees

In Smith v. BellSouth Telecommunications, Inc. (11/27/2001), the U.S. Court of Appeals for the Eleventh Circuit ruled that a former employee may sue his former employer for retaliating against him when it refused to rehire him based on leave previously taken under the Family and Medical Leave Act. Arthur Smith applied for employment with BellSouth after having resigned his employment a few months earlier. When BellSouth's staffing manager reviewed his file, she saw it was stamped "not eligible for rehire." Notes from Smith's former manager revealed that he "took a lot of FMLA." Smith sued BellSouth alleging that it failed to rehire him in retaliation for his having taken FMLA leave. The trial court dismissed his claim, ruling that the FMLA protects only current employees. Smith appealed.

The appeals court determined that confining the FMLA's protections to current employees would frustrate the remedial purpose of the FMLA. The court noted that other laws, such as

Title VII, the Fair Labor Standards Act, the Age Discrimination in Employment Act, and the National Labor Relations Act, apply to current, former and prospective employees. Although BellSouth argued that the FMLA excluded former employees, the appeals court found that the FMLA was ambiguous. Accordingly, the court deferred to a Department of Labor regulation that prohibits an employer from discriminating against former employees who have used FMLA leave and further prohibits employers from using the taking of leave as a negative factor in hiring decisions.

Court Rules that Former Employee May Claim Discrimination under the ADA and Discusses whether Different Benefit Levels for Mental and Physical Disabilities in an LTD Plan Violate the ADA

In Johnson v. K-Mart Corporation (11/21/2001), the U.S. Court of Appeals for the Eleventh Circuit ruled that a former employee who was no longer able to work because of a disability is eligible to challenge a limitation on post-employment benefits under the Americans with Disabilities Act. The appeals court also ruled that different benefit levels for mental and physical disabilities in a long-term disability plan might violate the ADA, but returned the case to the trial court to determine whether K-Mart's policy of providing different disability benefits was a subterfuge to evade the purposes of the ADA.

James Johnson worked for K-Mart for thirty years until his physician advised him to stop working due to severe depression and emotional illness. Johnson applied for and received long-term disability benefits from K-Mart. K-Mart's plan provides that employees disabled due to a mental illness may receive salary replacement benefits for two years while employees disabled due to a physical illness may receive benefits until age 65. Johnson sued K-Mart alleging that the two-year cap on mental health benefits violated the ADA. Although the appeals court found the ADA's definition of "employee" ambiguous, it examined the purposes of the ADA and other laws, and concluded that the ADA protected former employees. The court determined that an LTD plan that differentiates between individuals who are disabled due to a mental disability and those who are disabled due to a physical disability is a form of discrimination under the ADA. However, the court also ruled that the ADA's safe-harbor provision might shield an LTD plan so long as the plan was not used as a subterfuge to evade the purposes of the ADA. Because the court did not have enough facts to decide whether there was a subterfuge, it returned the case to the lower court.

Sexual Harassment Policy Ruled Ineffective because Employee Was Required To Complain to Her Harasser

Priscilla Hare worked in the machine shop of H&R Industries. She alleged that she was repeatedly subjected to inappropriate sexual comments and touching, that rumors circulated around the workplace concerning her sexual activities, that she was exposed to pornography on a supervisor's computer, that another supervisor bought her gifts and visited her house,

around the plant. H&R asserted as an affirmative defense that it had a sexual harassment policy and that Hare's claims should be dismissed because she failed to exercise her rights under that policy. In Hare v. H&R Industries, Inc. (11/7/2001), the U.S. District Court in Pennsylvania rejected H&R's defense because, under the policy, Hare was required to report to her supervisor who was one of the alleged harassers. Hare also offered evidence that, when she tried to complain of harassment, she was instructed to retaliate in kind against her coworkers. Accordingly, the court found that H&R's sexual harassment policy was ineffective and that her failure to pursue the policy was reasonable.

Court Recognizes Retaliation Claim for Intending To Take FMLA Leave

Michael Skrjanc worked for an affiliate of Great Lakes Power Service Company repairing pumps. He injured his foot at work causing him to take a leave of absence for nearly 12 weeks. His foot problems continued and, two years later, a doctor recommended surgery that would result in him missing three months of work. Skrjanc informed his supervisor and a manager that he needed foot surgery and a leave of absence to recover. About three months earlier, Great Lakes had begun considering divesting itself of the unit where Skrjanc worked. As a result of the divestiture, Skrjanc was terminated. Skrjanc sued Great Lakes alleging that it retaliated against him for intending to take leave under the Family and Medical Leave Act. In Skrjanc v. Great Lakes Power Service Company (11/14/2001), the U.S. Court of Appeals for the Sixth Circuit ruled that the right to take FMLA leave includes the right to declare an intention to take such leave in the future. Although the court recognized a violation of the FMLA for retaliation against an employee intending to take statutorily protected leave, the court found that Skrjanc failed to show that Great Lakes treated him differently than similarly-situated employees. Accordingly, the court affirmed dismissal of his claims.

Fraud Claim not Covered by LMRA

In Wynn v. AC Rochester, General Motors Corporation (11/19/2001), the U.S. Court of Appeals for the Second Circuit ruled that that Labor Management Relations Act did not preempt James Wynn's claim that a personnel manager at a GM plant made false representations to him about his right to unemployment benefits under his collective bargaining agreement. At the time Wynn was laid off by GM, he met with a personnel manager to obtain information about unemployment benefits. Wynn was allegedly told that he was eligible only for a lump-sum separation payment and not for supplemental unemployment benefits and that neither he nor any other laid off employees would be recalled. As a result, Wynn elected to apply for the separation payment that, by its terms, did not allow future recall. None of these statements were true, as Wynn was eligible for supplemental employment benefits that would not have precluded future recall and many of his fellow employees ultimately were recalled.

Wynn filed a fraud claim in state court and GM removed the case to federal court asserting

that the LMRA provides federal jurisdiction for lawsuits involving a violation of a contract between an employer and a labor organization representing employees. The district court dismissed Wynn's claims and he appealed. The appeals court vacated the dismissal and ordered that the case be returned to state court where Wynn could prosecute his fraud claim. The court noted that this was not a case involving the interpretation of a collective bargaining agreement because both parties agreed on its terms; rather, Wynn's claim was that GM officials misled him into selecting his options under the collective bargaining agreement by misrepresenting their availability.

Compensatory Damages Are Not a Prerequisite to Title VII Punitive Damages

Tonia Cush-Crawford worked as a laboratory technician for Adchem Corporation. She alleged that her supervisor told her she looked beautiful and loved the dresses she wore, asked her on numerous dates, booked a single hotel room on business trips with her, repeatedly spoke of having sexual relations with her, evaluated her poorly following her rejections of his advances and graded her highly after she agreed to date him.

Cush-Crawford filed a lawsuit against Adchem alleging hostile environment sex harassment, quid pro quo sex harassment and retaliation in violation of Title VII. Adchem claimed that the relationship between Cush-Crawford and her supervisor was consensual. After a trial, a jury awarded Cush-Crawford $0 and $100,000 in punitive damages. Adchem appealed, asserting that punitive damages were improper in the absence of an award of compensatory damages.

In Cush-Crawford v. Adchem Corporation (11/16/2001), the U.S. Court of Appeals for the Second Circuit ruled, in a case of first impression, that punitive damages under Title VII may be awarded in the absence of an award of compensatory damages. As explained by the court, there is some unseemliness for an employer that engages in malicious or reckless violations of a legal duty to escape either the punitive or deterrent goal of punitive damages merely because either good fortune or an employee's unusual strength or resilience protected her from suffering harm.

Court Overturns $175,000 Jury Award for Violation of Free Speech

Patrol Officer Draphy Durgins and two other police officers engaged in horseplay while on duty. The officers threw bullets on the floor, played keep-away with a knife, and handcuffed Durgins to a fence with her apparent consent. After an investigation of all of the officers, Durgins was fired for concealing a criminal record and falsifying her credentials. The other officers were not fired and Durgins claimed that the other officers should have been disciplined more severely. She filed a lawsuit claiming that she was fired for asking for harsher discipline for the other officers and that her discharge penalized her right of free speech. A jury awarded her $175,000 damages and the trial judge added an award for attorneys' fees and issued an injunction requiring her reinstatement. The city appealed. In Durg

Durgins v. City of East St. Louis (11/16/2001), the U.S. Court of Appeals for the Seventh Circuit overturned the jury award and dismissed Durgins' claim. The appeals court noted that no free speech claim existed because personnel matters are not covered by the first amendment. The court reasoned that Durgins' claim that the public had an interest in how police departments handled personnel systems was a thinly veiled request to treat all speech within a public bureaucracy as protected by the first amendment. The appeals court also ruled that resume fraud was not protected speech and that an employer that discovers that it should not have hired the person in the first place may decide to end the employment without any objection that the discharge was retaliation for speech.

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