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

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No Sex Discrimination for Refusal to Promote Due to Lack of Confrontational Skills

Sarah Crone worked as a dispatcher for United Parcel Service. She applied for a supervisor position, but her department manager, Ray Whitaker, refused to recommend her for the promotion. According to Crone, Whitaker told her that he was scared she would cry if she got into a confrontation or situation with a driver. After a male – who had been a part-time supervisor -- was promoted to the position Crone sought, Crone sued UPS for sex discrimination in violation of Title VII. In Crone v. UPS (8/30/02), the U.S. Court of Appeals for the Eight Circuit rejected Crone's claim. The court ruled that UPS's assertion that Crone lacked the confrontational and leadership skills needed for a dispatcher supervisor job was a legitimate non-discriminatory reason for denying her the promotion. Crone herself had admitted that the job required oversight of a unionized workforce she described as "exceptionally confrontational" and that she had difficulty in handling confrontation in that she once had been close to tears after a heated exchange with a driver. Given those facts, the court noted that Crone could not show that the asserted lack of

confrontational skills, undisputedly needed for the job, was a pretext for sex discrimination.

Instructing Employee Not Discuss Her Sexual Harassment Allegations Did Not Toll the 300-Day Period for Filing Her Claim with EEOC under the Equitable Estoppel Doctrine

Stephanie Beckel was employed as a loss-prevention associate at a Wal-Mart distribution center when she reported being sexually harassed by her immediate supervisor. The center's general manager told Beckel not to discuss her allegations of harassment with anyone else, except himself and the other senior managers at the center. A few months later, Beckel was discharged. She filed a complaint with the U.S. Equal Employment Opportunity Commission charging Wal-Mart with sexual harassment and retaliation in violation of Title VII. Wal-Mart asserted that Beckel's harassment complaint was untimely, because she had waited more than the 300 days allowed for the filing her complaint. In response, Beckel argued that the doctrine of equitable estoppel prohibited Wal-Mart from claiming untimeliness. Beckel asserted that she understood the general manager's instruction not to discuss her harassment allegations with anyone else as preventing her from seeking the assistance of the EEOC or an attorney and that the manager threatened her with the loss of her job if she did not heed his instruction. The trial court rejected Beckel's argument and dismissed her complaint as untimely. She appealed.

In Beckel v. Wal-Mart Associates, Inc. (8/29/02) the U.S. Court of Appeals for the Seventh Circuit affirmed the decision of the trial court, explaining that the equitable estoppel doctrine required Beckel to show that Wal-Mart had taken deliberate steps to prevent her from bringing a timely lawsuit. Acknowledging that employers have a right to prevent the spread of what may be groundless rumors of improper conduct, Wal-Mart's order that Beckel not discuss her allegations of harassment did not meet the equitable estoppel requirements, since it was not phrased in a way calculated to mislead a reasonable person. The appeals court also rejected Beckel's claim that she had been threatened with job loss by the general manager, finding her allegation contradicted by her deposition testimony that failed to mention such a threat. Finally, the appeals court rejected the argument advanced by Beckel's lawyer that it should ignore the omission because the decision to omit references to the threat at her deposition had been a tactical issue.

Court Upholds Arbitration Agreement and Orders Arbitration of Wage Claims

Curtis Adkins was one of many persons who worked as a temporary employee for Labor Ready, Inc. Labor Ready is a temporary employment agency providing manual labor in construction, landscaping, warehousing, catering, moving, hotel, and light-industry for companies throughout the United States. The temporary employees report to any of Labor Ready's dispatch centers before the start of the workday and wait there until they receive a job assignment. They then proceed to the customer's job site. At the end of the workday, the temporary employees return to Labor Ready's offices, present documentation signed by the customer verifying their work hours and collect their wages. If any employees elect to

receive payment in cash, Labor Ready deducts a $1.00 or $2.00 fee from the payments.

Adkins (and 63 other Labor Ready temporary employees) filed a class action lawsuit against Labor Ready, claiming violations of the federal Fair Labor Standards Act and West Virginia's minimum wage and wage payment statutes. Adkins alleged that the employees were entitled to payment for all time spent in Labor Ready's offices waiting for a job assignment or while training for a position and also were entitled to payment for travel time to the customer's job site. Adkins also claimed reimbursement for commuting expenses to and from customers' job sites and claimed that the deductions for cash payments were unlawful.

Before joining Labor Ready's employee pool, all applicants completed an application that included an arbitration provision. The provision provided that "any disputes arising out of my employment … and all employment related issues … will be resolved by arbitration as my sole remedy." Under the arbitration provision, Labor Ready also agreed to arbitrate any claims it may have against the temporary workers. In response to Adkins' lawsuit, Labor Ready cited the arbitration provision and asked the court to compel arbitration and dismiss the lawsuit. The trial court granted Labor Ready's relief and Adkins appealed.

In Adkins v. Labor Ready, Inc. (8/30/02), the U.S. Court of Appeals for the Fourth Circuit ruled that the arbitration agreement was enforceable and upheld the dismissal of Adkins' claims. The appeals court rejected Adkins' argument that the bargaining imbalance between Labor Ready, an international company with annual revenues of about $850 million, and its workers, some of whom had not completed high school, made the arbitration agreement unconscionable. The appeals court noted that adopting such an argument would invalidate most of the agreements between employers and employees given the common disparity between the education of company officials and their workers. The appeals court also rejected Adkins' claim that the costs of arbitration were too high for the temporary workers. The appeals court observed that Adkins' argument was wholly speculative since he had failed to present any evidence showing the costs of the arbitration and noted that, since he could afford to file a federal lawsuit, he probably could afford the costs of the arbitration.

Massachusetts Supreme Judicial Court Rules that the Anti-Discrimination Statute Does not Provide a Right of Contribution

Jennifer Thomas was employed as a manager by EDI Specialists, Inc. Thomas claimed that after announcing her pregnancy she was subjected to ongoing discrimination and was forced to document every minute of her time. After the birth of her child, Thomas was not returned to the job she had before her maternity leave. Her status was also changed from a salaried employee to an hourly worker. Thomas filed a discrimination claim with the Massachusetts Commission Against Discrimination and later removed her claim to the Superior Court. Both the MCAD and the Superior Court complaints named EDI Specialists as the sole respondent/defendant, although the complaint identified Steven Mills, EDI's operations director, as the primary offender. EDI filed a third-party complaint against Mills for

contribution and indemnification. Mills asked the court to dismiss the complaint against him, arguing that the Massachusetts contribution statute did not apply to EDI's claim arising out of Thomas' discrimination claim. The trial court agreed and dismissed him from the lawsuit. On EDI's appeal, the Supreme Judicial Court ruled in Thomas v. EDI Specialists, Inc. (8/15/02), that allowing a claim for contribution to proceed against a party not named in the MCAD administrative charge interfered with the legislature's preference for resolving proceedings in an administrative proceeding. In addition, the court also noted that a claim for contribution first raised in trial proceedings would be untimely. Moreover, the court noted that the Massachusetts law against discrimination imposes liability on an employer for the discriminatory acts committed by himself *or his agent*, and any action shifting that obligation would circumvent the purposes of the statute. However, the court recognized that employers can enter into indemnification contracts with employees that may be enforced in a separate action if an employer is held liable for the employee's discriminatory misconduct.

Company's Anti-Union Campaign Video Violated NLRA

In preparation for a campaign against a Steelworkers union organizing drive, officials of the Allegheny Ludlum Corporation prepared an anti-union video featuring employees of the unit being organized. On the first day of filming, Allegheny's manager of communication services asked employees to consent to being filmed. Any employee who did not wish to be filmed could contact either of two company managers to be edited out. On the second and third days of filming, the manager distributed written notices advising all employees that a film crew would film footage for an upcoming video presentation that the company will use to present the facts about the current election involving the Steelworkers. The notice instructed any employee who did not want to be filmed to inform the director of employee relations and in-house legal counsel. A third notice advised employees to instruct the filmmakers (not company officials) if they did not wish to be filmed. The completed video showed employees satisfied with their non-union status and expressing dissatisfaction with unions at other employers or other Allegheny units. Some featured employees observed that unionized units of Allegheny had experienced layoffs while the non-union employees had no layoffs in the past four years. The video urged viewers to reject the union. The election was held and the union lost by 12 votes: 237 to 225. The union filed unfair labor charges against Allegheny with the National Labor Relations Board. The NLRB agreed with the union and found that, in filming the anti-union video, Allegheny had unlawfully polled employees about their union preference. Allegheny appealed.

In Allegheny Ludlum Corporation v. NLRB (8/26/02), the U.S. Court of Appeals for the Third Circuit affirmed the NLRB's ruling. The court examined five factors to determine whether Allegheny improperly solicited employees for a campaign video: (1) the solicitation must be in the form of a general announcement that discloses the purpose of the filming and assures that participation is voluntary and that it will not result in reprisals or reversals; (2) employees must not be pressured into deciding whether to participate in the presence of a supervisor; (3) there must not be coercive conduct connected with the

employer's announcement; (4) the employer must not create a coercive atmosphere; and (5) the employer must not exceed the legitimate purpose of soliciting consent by interfering with statutory rights. Allegheny contended that its filming did not constitute illegal polling as its purpose was not to discern employees' views on the union issue. The appeals court disagreed. Because Allegheny's consents for the anti-union video did not comply with the five-factor test, the court found Allegheny had committed an unfair labor practice. Allegheny was ordered to conduct a new election and to comply with the solicitation requirements imposed by the NLRB's five-factor test.

Despite References to Plaintiff's Age and His Retirement Plans, Court Dismissed Age Discrimination Claim

Thomas Wallace worked for O.C. Tanner Company developing and promoting employee recognition and rewards programs in the Northeast. Wallace was promoted to Regional Sales Manager and for 12 of the last 15 years his region was ranked in the top 10 for sales. After 21 years with O.C. Tanner, Wallace's supervisor, Rulon Horne, prepared a memo addressing Wallace's poor work performance. Horne noted that in the past few years Wallace's sales had been declining, that there was a lack of overall growth in the Boston market, that his management style was intimidating, that he had refused to sign a confidentiality agreement, and that his reluctance to use the company-issued laptop computer made it difficult to track his activities. Horne's memo also noted that O.C. Tanner wanted to end its relationship with the brochure printing business owned and operated by Wallace's wife and to relocate the regional office out of a building owned by Wallace or at least obtain a favorable lease from him.

Two company officials discussed Horne's memo with Wallace. Wallace claimed to have given credit for his own sales to a senior sales associate in the office, promised to take immediate action to increase sales, promised to execute the confidentiality agreement, and agreed to prepare a lease within a week. He also promised to log onto his laptop immediately. Within two days of that discussion, Horne received a call from Patty Prew, the Boston office administrator. Prew was surprised that Wallace had not been fired at the meeting and told Horne that in the past couple of years Wallace had spent little time on O.C. Tanner's business because he was spending his time on a personal real estate matter. Conversations with other regional employees confirmed that Wallace had minimal contact with their offices. Officials conducted an on-line search of Boston-area newspapers and found numerous articles about Wallace's real estate project. Citing Wallace's real estate development deal, O.C. Tanner terminated his employment. At the time of his termination, Wallace was 53 years old. He was replaced by a worker 36 years old. Wallace sued Tanner claiming age discrimination. As evidence, Wallace alleged that O.C. Tanner officials had asked him about his plans for retirement on four different occasions. In addition, at the meeting when it was decided to terminate Wallace, the company's president asked about Wallace's age as part of a risk assessment. The president, a former trial attorney, commented on the absence of any evidence of age discrimination and directed the termination to proceed.

In Wallace v. O.C. Tanner Recognition Company (8/14/02) the U.S. Court of Appeals for the First Circuit rejected Wallace's age discrimination claim. The appeals court construed the comments and questions about Wallace's retirement plans as stray remarks, noting that neither of the two managers who had asked Wallace about his plans was involved in the discharge decision. The appeals court observed that company officials are permitted to gather information relevant to personnel planning without raising the spectre of age discrimination. As to the president's comments, the appeals court found his explanation plausible, noting that the potential for legal action is routinely reviewed when terminating an employee, and that awareness of legal obligations does not necessarily imply an inference of guilt. Based on these factors, the court concluded that Wallace did not show that O.C. Tanner's decision to terminate his employment on account of the time he spent on his personal real estate project was a pretext for age discrimination.

Diversity Immigration Visa Lottery Program Registration to Begin October 7

It is time again for the Diversity Immigrant Visa Lottery Program known as "DV-2004." DV-2004 provides 50,000 immigrant visas (green cards) each fiscal year to natives of countries from which immigration has been low over the preceding five years. Applicants for the DV-2004 program are chosen through a computer-generated random lottery. However, the Immigration and Naturalization Service determines the distribution of visas and allocates visas among six geographic regions with a greater number of visas going to regions with lower rates of immigration. Within each region, no one country may receive more than seven percent of the available visas. To be eligible, an applicant must apply, be a native of one of the designated countries and satisfy certain other requirements with regards to education and training. For a list of the designated countries, other eligibility requirements and an application, click here. The registration period for this year's lottery begins October 7, 2002 and ends on November 6, 2002.

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