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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Gay Man Permitted to Bring Sexual Harassment Claim under Title VII

Medina Rene, who is openly homosexual, worked at the MGM Grand Hotel in Las Vegas as a butler for wealthy, high profile guests of the hotel. Following his termination, Rene sued MGM for sexual harassment, alleging that his supervisor and co-workers, all of whom were male, subjected him to a hostile work environment. Specifically, Rene claimed that his supervisor and co-workers routinely blew kisses at him, called him “sweetheart” and “munÞeca” (Spanish for “doll”), gave him sexual paraphernalia and pictures of nude men having sex, and inappropriately touched him a sexual way, including grabbing his crotch and poking his anus through his clothing. When asked what he believed the motivation was for this treatment, Rene indicated that it was because he is gay. In light of this admission, the trial court dismissed the lawsuit in favor of MGM, ruling that Title VII does not extend to discrimination based on sexual orientation. Rene appealed.

In March 2001, a split panel of the U.S. Court of Appeals for the Ninth Circuit ruled that

Rene was discriminated against solely on the basis of sexual orientation and, thus, not because of his sex, as Title VII requires. Following that decision, Rene requested that the issue be reconsidered by the full Ninth Circuit Court of Appeals.

In Rene v. MGM Grand Hotel, Inc. (9/24/02), the full Ninth Circuit, in a 7-4 decision, overturned the panel decision and permitted Rene's claim under Title VII to proceed to trial. The majority decision explained that Title VII forbids severe or pervasive sexually offensive touching, and that the fact that the perpetrator and victim are of the same gender does not prohibit bringing a sexual harassment claim. The majority found that the offensive conduct in this instance was clearly both sexual and discriminatory and, therefore, constituted discrimination because of sex. The majority added that both Rene's homosexuality and the fact that the harassers were or may have been motivated by hostility based on his sexual orientation are irrelevant for purposes of Title VII, and neither provide nor preclude a sexual harassment claim.

Four dissenting judges argued that Title VII should not apply because the alleged treatment of Rene, although degrading and humiliating, occurred because of his sexual orientation, not because of his sex. The dissent opined that Rene was not treated differently from the other butlers because he was male, but because he was homosexual. Based on this distinction, the dissent posited that the claim was not actionable under Title VII.

California Is First State to Authorize Paid Family Leave

When California Governor Gray Davis signed S.B. 1661 on September 23, 2002, California became the first state to authorize paid family and medical leave. The new California law, which will become effective January 1, 2004, taps the State Disability Insurance fund to provide for six weeks of family leave over a 12-month period at up to 55% of an employee's wages. Unlike the federal Family and Medical Leave Act and the California Family Rights Act, both of which apply only to employers with 50 or more employees, S.B. 1661 will apply to all employers, regardless of size. Under S.B. 1661, paid leave will be available for the birth or adoption of an employee's child, for the birth or adoption of a child by an employee's domestic partner, or for an employee to care for a seriously ill spouse, domestic partner, parent or child.

Connecticut Employer May be Liable for Employee's Road Rage

Christopher Caswell worked as a driver for the Fall River News Company. While driving a vehicle owned by Fall River, Caswell rear-ended a vehicle driven by 78 year old Harold Shippee. According to Shippee, Caswell immediately exited his vehicle, walked up to Shippee's vehicle, opened the driver's side door and punched Shippee in the face. Shippee filed a lawsuit against both Caswell and Fall River, seeking to hold Fall River liable for negligently hiring, supervising, training, and retaining Caswell, failing to institute a reasonable policy against on-the-job violence, and entrusting Caswell with the use of a vehicle. Fall River asked the court to dismiss all of the claims against it on grounds that it

could not be held liable as Caswell's employer for Caswell's road rage.

In Shippee v. Caswell (9/23/02), the Connecticut Superior Court refused to dismiss and allowed the claims alleging negligence by Fall River. The court found that it was reasonably foreseeable that Caswell would come into contact with other drivers during the scope of his employment and that, as his employer, Fall River owed third parties a duty of care before entrusting its automobile to Caswell. Whether Fall River breached that duty to Shippee, the court held, presented a question of fact to be determined by a jury. Specifically, it is up to a jury to determine whether Fall River, as Caswell's employer, knew or ought reasonably to have known that Caswell was so prone to bouts of road rage that Fall River ought to have anticipated a likelihood of injury to others.

Arbitration Ruling May Be Used as Evidence in Discrimination Action

James Collins, who is African-American, was employed as a power maintainer's helper for the New York City Transit Authority. His supervisors claimed that Collins was insubordinate, directed profanity at them, threatened them and struck a supervisor in the face, breaking his glasses. The Transit Authority sought to terminate his employment in accordance with its standard procedure for an employee assault. Pursuant to the governing collective bargaining agreement, Collins filed a grievance. The arbitration board found that Collins had physically assaulted the supervisor and could be terminated. The Transit Authority effectuated his termination immediately. Collins filed a lawsuit against the Transit Authority alleging race discrimination in violation of Title VII. The trial court dismissed the lawsuit, ruling that, in light of the decision by the arbitrator permitting the termination, the allegations of discriminatory motives were legally insufficient. Collins appealed.

In Collins v. New York City Transit Authority (9/20/02), the U.S. Court of Appeals for the Second Circuit affirmed the dismissal of the lawsuit. The appeals court explained that a negative arbitration decision rendered under a collective bargaining agreement does not preclude a Title VII action by a discharged employee. However, the appeals court stated that a decision by an independent tribunal will attenuate an employee's proof of the requisite causal link between the termination and a motive of discrimination. Accordingly, because Collins was finally discharged only after the arbitration board held an evidentiary hearing and authorized the termination for striking a supervisor, the appeals court found that Collins had not met even the low threshold needed to establish a prima facie case of employment discrimination.

USERRA Does Not Require Discriminatory Intent

Marvin Jordan, a naval reservist, worked as a gasoline loader and filler for Air Products and Chemicals. Jordan advised Air Products that he would be absent for three weeks to serve in the reserves. Shortly after returning to work, he was terminated. Jordan sued Air Products

for violations of the Uniform Services Employment and Reemployment Rights Act. Air Products asked the court to dismiss Jordan's claim on the basis that he had failed to prove that Air Product's decision to terminate Jordan was motivated by his military service. In Jordan v. Air Products and Chemicals, Inc. (9/17/02) the U.S. District Court for California ruled that USERRA does not require proof that the service member's military service was a motivating factor in the employer's decision. Emphasizing that USERRA is to be interpreted liberally for the benefit of service persons, the court explained that USERRA creates an unqualified right to reemployment for those who provide proper notice of the need for military leave and whose service does not last more than five years. An employer's only available defenses, the court added, are that reemployment is unreasonable, impossible, or creates an undue hardship. Because Air Products alleged none of those defenses, the court awarded judgment in favor of Jordan.

Termination of Police Deputy for Adultery Did Not Violate Constitutional Rights

Lewell Marcum worked as a deputy sheriff. The sheriff's department began receiving numerous complaints about a romantic relationship between Marcum and Rena Abbott, an informant for the sheriff's department who, like Marcum, was married to another person. As rumors of the adulterous relationship continued to circulate, the sheriff's department received complaints from employees, courthouse workers, and various citizens within the community. After learning that Marcum and Abbott had moved in together, the sheriff told Marcum that either he or Abbott would have to move out. When that did not happen, Marcum was terminated. Marcum sued for wrongful termination, asserting that his exclusive, romantic relationship and cohabitation with a married woman was entitled to protection under the constitutional right of association. The trial court dismissed the lawsuit, concluding that Marcum's extramarital relationship was not entitled to constitutional protection. Marcum appealed.

In Marcum v. McWhorter (9/19/02), the U.S. Court of Appeals for the Sixth Circuit upheld the trial court's dismissal and denied Marcum's appeal. The appeals court explained that while Marcum's firing may have been unfair, it did not infringe on his constitutional right of association. The appeals court explained that although the Constitution protects certain kinds of intimate, personal relationships the adulterous nature of the relationship between Marcum and Abbott did not portray a relationship of the most intimate variety afforded protection under the Constitution. Constitutional protection, the court explained, extends to fundamental liberties that are deeply routed in the nation's history and tradition. Noting this country's history of criminalizing adultery, the appeals court concluded that the right to engage in an intimate sexual relationship with the spouse of another cannot be said to be either deeply routed in the nation's history and tradition, nor a fundamental element of personal liberty.

Court Recognizes Claim for Wrongful Termination by CFO Discharged for Refusing to Certify False Financial Records

John McGarrity worked as the chief financial officer for Berlin Metals. As the CFO, McGarrity arranged for loans contingent on McGarrity producing certified financial statements reflecting Berlin's financial condition. McGarrity discovered that Berlin had classified much of its inventory as finished goods to qualify for an interstate commerce exception from the personal property tax. He believed that the classification was improper and that almost all of the inventory was raw material subject to full taxation. The following year, McGarrity suggested that Berlin move inventory out of state to avoid the property tax, but Berlin refused. Berlin withheld copies of its property tax returns so he was unable to verify the figures. He also discovered that Berlin had not moved the bulk of the inventory as represented and had created false bills of lading and false entries in its inventory tracking system to make it appear that its warehouse held less inventory then it actually did. McGarrity was in the process of trying to correct those errors with the state when Berlin terminated him.

McGarrity sued Berlin for wrongful termination, claiming that he was fired for failing to comply with Berlin's scheme to defraud the state and its lenders by misrepresenting the location of inventory. At the end of a jury trial, the court dismissed McGarrity's wrongful termination claim on the grounds that Indiana law did not permit a claim for wrongful termination by an officer for refusing to certify false financial statements. In McGarrity v. Berlin Metals, Inc. (8/6/02), the Indiana Court of Appeals reversed, ruling that McGarrity had presented sufficient evidence to allow a jury to determine whether Berlin had wrongfully terminated his employment in violation of an important public policy of his refusing to be party to an illegal, fraudulent scheme of under-reporting tax liability.

Arbitration Award Ordering Future Negotiation is Not Permitted

The Rocky Hill Teachers' Association was the bargaining agent for teachers employed by the town of Rocky Hill. The association and the Board of Education disputed whether the costs of dental premiums should be included in the calculation of the teachers' share of their overall healthcare premiums. Following an arbitration, the arbitrator determined that the Board of Education violated the bargaining agreement by including the dental premium costs in the calculation and, as a remedy, ordered the parties to negotiate whether the dental costs should be included within a formula to determine teacher contributions toward health premiums. The arbitrator also ordered that, if the negotiations do not result in an agreement within 30 days, the parties must submit the issue to binding arbitration under the state Teacher Negotiation Act. The association asked the court to vacate the award and the Board of Education asked the court to confirm it. After the trial court confirmed the award, the association appealed. In Rocky Hill Teachers' Association v. Board of Education (9/10/02) the Connecticut Appellate Court ruled that an arbitration award that ordered the parties to negotiate in the future was not final and definite so as to be confirmed by a judicial order. The appeals court explained that an award open for future negotiation is not a final award that may be reviewed by the court.

For more information, please contact us

Stephen W. Aronson	Andrew S. Golden	Alida Bogran-Acosta
860-275-8281	860-275-8309	617-557-5963

ROBINSON & COLE LLP
Boston - Hartford - New London - Stamford - Greenwich - New York

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