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

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Potential Violation of a Seniority System Does Not Exempt Employer from Making a Job Reassignment as a Reasonable Accommodation under the ADA

After 18 years as a truck driver for SuperValu, Donald Dilley developed back problems. When his doctor placed him on a 60 pound lifting restriction, Dilley asked SuperValu to assign him to a truck route that did not require heavy lifting. SuperValu refused Dilley's request and instead offered him the opportunity to apply for two positions: a non-union dispatch job (with a substantial cut in pay) or a merchandising position that might open up in the future. Dilley rejected both choices, insisting on the alternate truck route. SuperValu terminated his employment. Dilley sued, claiming that SuperValu's refusal to assign him to the alternate truck route and consequent termination was a failure to reasonably accommodate his disability in violation of the Americans with Disabilities Act. SuperValu claimed that Dilley's request was unreasonable given its seniority system, which prevented it from assigning Dilley to the requested truck route, as he could have been "bumped" by a more senior driver.

In Dilley v. SuperValu, Inc. (7/15/02), the U.S. Court of Appeals for the Tenth Circuit ruled that Dilley's requested accommodation was not unreasonable. Although the court recognized that under the U.S. Supreme Court's decision in U.S. Airways, Inc. v. Barnett (reported in the May 6, 2002 issue of e-News), the ADA does not require an employer to violate a well-established seniority system, it found that SuperValu's argument was not persuasive. Dilley had enough seniority to be placed into a non-lifting truck driver position. He was also the fifth most senior driver and so the likelihood that he would have been bumped off the non-lifting position was remote. The court explained that a potential violation of SuperValu's seniority system did not make Dilley's requested accommodation unreasonable. The court also determined that the ADA required SuperValu to first consider lateral moves to equivalent positions and to offer a lesser job only if no equivalent position was available. Given that Dilley qualified for the equivalent non-lifting position, SuperValu's offer that Dilley apply for a job that paid significantly less was not a reasonable accommodation. The court also noted that reinstatement was the preferred remedy under the ADA and directed the trial court to reconsider its decision that Dilley not be reinstated.

Under the "Integrated Enterprise" Theory, Title VII May Apply to Employers with Fewer than 15 Employees

U. Lim America, a California corporation that employed six or fewer employees, owned and operated U. Lim de Mexico, an electronics factory in Tijuana, Mexico. U. Lim de Mexico was incorporated under Mexican law and its factory employed between 50 and 150 Mexican nationals. U. Lim America was the only client of U. Lim de Mexico. Both companies were owned by Ki Hwa Yoon, who also was the CEO of both and President of U. Lim America. His son, Tae Jin Yoon, was Vice-President of U. Lim America and President of U. Lim de Mexico. U. Lim America paid all the bills, including payroll, of U. Lim de Mexico. U. Lim America had the authority to hire and fire the employees of U. Lim de Mexico. U. Lim America did not have any facilities in the United States and its employees commuted across the border to work at the Tijuana factory on a daily basis. All of the employees of U. Lim America were of Korean descent.

Soo Cheol Kang, a U.S. citizen of Korean national origin, began working for U. Lim America. During the course of his employment, Kang was verbally and physically abused by Yoon, who called him "stupid," "cripple," "jerk," "son of a bitch," and "a--hole." Yoon also hit Kang in the head with a metal ruler, kicked him, and pulled his ears, and threw metal ashtrays, calculators, water bottles and files at him. When Kang's wife became pregnant, and he began to cut down on the required overtime, Yoon fired him. Kang filed a lawsuit against U. Lim America and Yoon, claiming national origin harassment and discrimination. He alleged that Yoon viewed Koreans as superior to Mexicans and demanded more of them, including longer hours. The trial court dismissed the lawsuit, finding that because U. Lim America had fewer than 15 employees, it was not covered under Title VII. Kang appealed.

In Kang v. U. Lim America, Inc. (7/15/02), the U.S. Court of Appeals for the Ninth Circuit reversed the trial court, ruling that U. Lim America and U. Lim de Mexico were an integrated enterprise with the combined minimum number of employees for purposes of Title VII. To make its determination, the appeals court applied a four-factor test that analyzed the interrelation of operations, common management, centralized control of labor relations, and common ownership. Given that both companies shared ownership, management, facilities, that U. Lim America paid all the bills for U. Lim of Mexico, including its payroll, and that it had authority to hire and fire workers of the Mexican company, the appeals court found an integrated enterprise existed. The appeals court also declared that, even though Title VII defines "employee" to include U.S. citizens employed by U.S. companies in foreign countries, the definition does not preclude counting the foreign workers necessary to determine coverage. Because the combined workforce of U. Lim America and U. Lim de Mexico exceeded 15 employees, the U.S. citizen workers were protected by Title VII and Kang's discrimination claims could proceed to trial.

No Adverse Employment Action in Refusal to Allow Black Female Employee to Perform Same Duties as Male Coworkers

Cynthia Traylor worked for the Illinois Department of Transportation as a highway maintainer. In that position, she repaired and maintained roads, drainage facilities, guardrails, bridges, and traffic signs. She also operated and occasionally serviced trucks, snow plows, mowing machines, and other highway equipment. Traylor was the only black and only female employee assigned to the Watseka facility. Traylor asked her supervisor for permission to perform some clerical and blacksmithing duties that were performed by her white coworkers. Traylor was never allowed to perform the duties she requested and so she filed a sex and race discrimination complaint against IDOT. The trial court concluded that even though she was not allowed to perform those duties, Traylor could not show any adverse employment action. Her pay was not affected, and her prospects for advancement were not impaired. Traylor also alleged that she was referred to as the "black girl" and the "token," but since she had not alleged a hostile work environment claim in her administrative filing, the trial court also dismissed that claim. Traylor appealed.

In Traylor v. Brown (7/12/02), the U.S. Court of Appeals for the Seventh Circuit upheld the decision of the trial court, noting that Traylor was not demoted, terminated, or disciplined, her pay was not affected, and her responsibilities as a maintainer were not diminished. The white male employees who performed the extra duties that Traylor sought did not receive extra pay, promotions, or prestigious titles. The appeals court stated that an adverse employment action must be more disruptive than a mere inconvenience or an alteration of job responsibilities and that not everything that makes an employee unhappy will constitute an adverse employment action.

Nurse Did Not Establish Retaliatory Failure to Hire Even When Employer Considered her Prior Complaints of Age Discrimination

Betty Weigel, age 56, was hired as a nurse with the Baptist Hospital of East Tennessee. During the course of her employment Weigel complained of preferential treatment for younger nurses, noting they had less work responsibilities, were given more favorable treatment for family or medical-related absences, and were not disciplined for attendance issues, as she was. Weigel complained to the Nurse Manager and President of Nursing. After four years, Weigel resigned from BHET, without giving the requisite two-week notice. BHET had a policy against re-hiring former employees unless they had complied with the two-week notice requirement. In an exit questionnaire, Weigel detailed instances of alleged age discrimination and noted she had resigned on advice of counsel. Eight months later, Weigel applied for a nursing position with BHET. She met twice with the interim nurse manager who, according to Weigel, offered her a job. The nurse manager and human resources personnel reviewed Weigel's personnel file and, taking into account her complaints of age discrimination, decided not to re-hire her. Instead, BHET hired a 42-year old. BHET falsely told Weigel that the hospital had instituted a hiring freeze and could not hire her. Weigel sued BHET claiming age discrimination.

In Weigel v. Baptist Hospital of East Tennessee (7/15/02), the U.S. Court of Appeals for the Sixth Circuit affirmed the dismissal of Weigel's claims. The appeals court explained that, even though BHET had lied to Weigel about the reason she was not hired and had considered her prior complaints of age discrimination, Weigel could not establish that her prior performance deficiencies, including her failure to provide the two-week notice and excessive absenteeism, were a pretext for age discrimination.

Employee Must Show that Decision-Maker Knew of his Religious Affiliation To Establish a Claim of Religious Discrimination

Steven Lubetsky interviewed for a job with Applied Card Systems. An interviewer, Debbie Gracia, offered Lubetsky the job conditioned on a satisfactory credit check. Lubetsky then told Gracia that he was Jewish and asked her about the company's policy on leave for religious holidays. According to Lubetsky, Gracia replied that, "Of course we have to let you off on Jewish holidays, it's illegal if we don't, but don't go to extremes like taking off on Purim." Gracia then reported the conditional offer to the Manager of the Correspondence Department, John Bardakjy. Bardakjy recognized Lubetsky's name as that of an individual he met at a job fair a year earlier and recalled him as being rude and aggressive. Bardakjy told Gracia that Lubetsky's personality and demeanor were not well suited for the job and instructed her to rescind the offer. Gracia did not tell Bardakjy that Lubetsky had told her he was Jewish or that he had asked about leave for religious holidays. Gracia decided not to tell Lubetsky of Bardakjy's comments. When she rescinded the offer, she told him the position had already been filled. Two weeks later, Lubetsky saw a newspaper advertisement for the same position. He sued Applied Card Services for religious discrimination in violation of Title VII.

In Lubetsky v. Applied Card Services, Inc. (7/12/02), the U.S. Court of Appeals for the Eleventh Circuit ruled that Lubetsky failed to establish a case of religious discrimination

because there was no evidence that Bardakjy ever knew that Lubetsky was Jewish. The appeals court explained that an employer cannot intentionally discriminate against an individual based on his religion unless the employer knows the individual's religion. Since Lubetsky did not show that Bardakjy knew that he was Jewish when he directed Gracia to rescind the offer, he could not prove a claim of religious discrimination.

Employee's Voluntary Resignation Due to Religious Conflict Does Not Constitute Constructive Discharge

Gregory Lawson was hired as cadet by the Washington State Patrol. When Lawson reported to basic training at the WSP Academy he was issued a procedures manual that noted that all cadets were required to assemble twice a day to salute the flag. According to the manual, any cadet who deviates from the rules will be subject to discipline, including termination. Lawson was a Jehovah's Witness, and even though his religious beliefs provided that he could not salute the flag of a state or nation, he participated in flag formation and salute during his first two days at the Academy. Lawson had also read the Trooper's Oath, which he would be required, upon completion of his training, to pledge allegiance to the United States and the State of Washington. On the evening of the second day, Lawson approached his Trooper Advisor Counselor and explained that he had decided to resign because his religious beliefs prohibited him from saluting the flag or taking the oath of allegiance. The Trooper Advisor Counselor did not offer Lawson any alternatives to either of these requirements. The following day Lawson met with the Commander of the Academy who presented him with a letter of resignation. Thinking he had no alternative, Lawson signed the resignation letter. During an exit interview, Lawson completed a questionnaire which stated that the conflict between his religious beliefs and his employment duties was the main reason for his resignation, although he also noted that his time away from family was also a factor. Lawson tried to obtain information on religious accommodation by the WSP, but was unsuccessful in his efforts. He then filed a religious discrimination complaint.

In Lawson v. State of Washington (7/12/02), the U.S. Court of Appeals for the Ninth Circuit held that Lawson could not establish a religious discrimination claim. The appeals court ruled that Lawson had voluntarily resigned, even though his employer did not offer any alternatives to the religious conflict he experienced. The appeals court noted that it was Lawson who first suggested that he resign and that WSP's failure to make extraordinary efforts to talk him out of leaving did not convert his resignation into a constructive discharge.

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