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

e-News is a bi-weekly electronic newsletter reporting on recent court decisions, new statutes and other timely and topical information. Where appropriate, e-News provides web links to databases where recipients can easily access the actual decisions, statutes or other information. Navigating e-News is just like navigating the web. To access a web link, simply position your cursor on the link and click your mouse. To return to e-News, hit the back button on your browser. To view back issues, click on the "e-News Archives" link on the masthead.

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Sending Letters to Union Members Offering Wage and Benefits Increases Results in Unfair Labor Practice

After a series of stalemates in collective bargaining negotiations with the International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, Miller Waste Mills sent a letter to each UAW employee decrying a lack of progress in the negotiations, blaming the UAW, and asking for a National Labor Relations Board election to determine whether the employees wanted the UAW to represent them. Two weeks later, Miller received a petition from some UAW employees asking Miller to grant a fair and decent wage increase and better health insurance. Miller sent two letters to the UAW employees stating that it was going to grant the largest wage increase in Miller's history and reduce employee contributions for health insurance. Miller did not consult with the UAW prior to announcing these unilateral wage and insurance changes. A short time later, Miller received a petition signed by a majority of its employees stating that they did not want the UAW to represent them. Based on the petition, Miller refused to negotiate with the UAW or

to recognize it as the employees' representative.

The UAW alleged that Miller violated the National Labor Relations Act by sending those letters to the unionized employees. After a hearing, the NLRB ruled against Miller, finding that Miller engaged in a series of unfair labor practices by dealing with the UAW employees directly and improving their wages and benefits while circumventing and undermining the union's authority. Miller appealed, asserting that its letters did not blame the union unfairly for the unsuccessful negotiations or constitute direct dealings with the employees. In NLRB v. Miller Waste Mills (1/10/03) the U.S. Court of Appeals for the Eight Circuit affirmed the NLRB's decision. The appeals court ruled that Miller committed an unfair labor practice by sending letters offering to grant them wage and benefits increases if they bypassed the UAW and rewarding the employees when they accepted the company's offer.

Workers' Compensation Claim with Former Employer Supports Retaliatory Discharge Claim

Michael Hayes was employed as a temporary painter by a series of contractors at the Arnold Engineering Development Center, a flight simulation testing center at Arnold Air Force Base in Tennessee. Hayes sustained a work-related injury while employed by Brighten Painting Company. Hayes filed a workers' compensation claim against Brighton and its insurer, which settled. Hayes, and four other temporary painters, were then hired by Aerospace Contractor Support. Aerospace later terminated Hayes, but none of the other four painters. According to Hayes, who had not experienced any injuries while working for Aerospace, his supervisor at Aerospace was ordered to terminate him because of his workers' compensation claim against Brighten. Hayes sued Aerospace for retaliatory discharge. The trial court dismissed the lawsuit in favor of Aerospace, stating that a workers' compensation retaliatory discharge claim could only be brought against an employer against whom the employee filed a workers' compensation claim. Hayes appealed. In Hayes v. Computer Sciences Corporation (1/14/03) the Tennessee Court of Appeals reversed the trial court's decision and reinstated the lawsuit. The appeals court explained that a retaliatory discharge claim against a subsequent employer is necessary to enforce the employer's duty and to protect the employee's rights and was consistent with both the legislative intent and public policies supporting Tennessee's workers' compensation laws.

Subjective Standard Governs Employment Contract Provision Allowing Termination for Unsatisfactory Performance

Optus Software hired Michael Silvestri as its Director of Support Services. Silvestri entered into a two-year employment contract that contained a satisfaction clause, giving Optus the right to terminate his employment for failing to perform to the company's satisfaction. Nine months after his hiring, Optus terminated Silvestri for unsatisfactory leadership skills. Silvestri sued Optus for breach of contract, alleging that Optus's dissatisfaction was objectively unreasonable. The trial court dismissed Silvestri's claim. On appeal, the

intermediate appeals court reversed the dismissal, ruling that an employer must meet an objective standard of dissatisfaction to invoke a satisfaction clause in an employment contract. Optus appealed.

In Silvestri v. Optus Software, Inc. (1/23/03) the New Jersey Supreme Court reversed the appellate court. The court explained that, unless an employment contract expressly provides for an objective standard, a subjective test of performance applies when an employer terminates an employee under a satisfaction clause. Under a subjective test, only the honesty and genuineness of the employer's dissatisfaction is considered. The reasonableness of the employer's dissatisfaction is not subject to scrutiny. Because Silvestri failed to prove that Optus's dissatisfaction with his performance was not genuine, the court ruled that he failed to meet his burden and dismissed his claims.

Employee Not Entitled to Immediate FMLA Leave to Care for Pregnant Wife

Two days after the anticipated due date for Steve Aubuchon's pregnant wife, his wife experienced false labor pains and Aubuchon requested FMLA leave from his employer, Knauf Fiberglass, to stay home to care for her. She eventually gave birth two weeks later. After Aubuchon had missed nine shifts during the two week period, Knauf denied his request for FMLA leave on the ground that it was not a qualified leave. In light of his prior attendance problems, Aubuchon was immediately terminated for violating Knauf's no-fault absenteeism policy.

Aubuchon sued Knauf claiming a violation of the FMLA. In Aubuchon v. Knauf Fiberglass, GMBH (1/10/03), the U.S. District Court for Indiana dismissed the lawsuit. Because any incapacity due to pregnancy is a serious health condition that warrants leave under the FMLA, the court posited that Aubuchon was most likely entitled to FMLA leave in connection with his wife giving birth. Nevertheless, because his need for leave was foreseeable, the court found that Knauf was entitled to 30 days advance notice from Aubuchon. Because Aubuchon did not notify Knauf of any change in circumstances or medical emergency that would warrant exigent leave, the court ruled that Knauf properly determined that the leave did not qualify under the FMLA.

USERRA Claim by Reservist Terminated after September 11, 2001 Attacks Goes to Jury

Jeanette Gillie-Harp was hired by Cardinal Health as an inside sales consultant. Gillie-Harp served as a reservist in the U.S. Air Force, which required her to take periodic military leaves. During the first year of her employment, Gillie-Harp requested military leave on four occasions. Her request was granted each time, but each request was met with increased resistance by her supervisor. After the September 11 attacks, Gillie-Harp informed her supervisor that she was required to report to Saudi Arabia for two or three weeks in January 2002. She sent an e-mail to some co-workers discussing the possibility that she would be

called to active duty in light of the terrorist attacks. Less than four weeks later, Cardinal terminated Gillie-Harp for disclosing confidential information about Cardinal's internal policies and procedures and disparaging the company to a customer. Gillie-Harp sued Cardinal under the Uniformed Services Employment and Reemployment Rights Act, claiming Cardinal terminated her employment because of her obligations as a military reservist.

Cardinal requested a dismissal of the lawsuit on the grounds that irrefutable evidence showed that Gillie-Harp disclosed confidential information and disparaged the company. In Gi Gillie-Harp v. Cardinal Health, Inc. (1/9/03), the U.S. District Court for Wisconsin refused to dismiss the lawsuit, finding that, even if Gillie-Harp engaged in the inappropriate conduct, Cardinal's decision to terminate her would still violate USERRA if Gillie-Harp's military status was an additional factor in Cardinal's decision. The court explained that it was up to a jury to determine whether Cardinal would have terminated Gillie-Harp regardless of her protected status as a military reservist.

EEOC Obtains Record Settlement of $250 Million

In the largest settlement ever obtained by the U.S. Equal Employment Opportunity Commission with respect to a single lawsuit, the California Public Employees' Retirement System, the nation's largest public retirement fund, and California state and local government employers of public safety officers, agreed to pay benefits of approximately $250 million to a class of more than 1,700 former employees. In Arnett and EEOC v. California Public Employees' Retirement System, which was filed in 1995 in the U.S. District Court for California, Ron Arnett and six other disabled retirees alleged that a California statute that paid disability benefits to public safety officers based on their age at hire rather than their years of service or at a flat service rate discriminated against them on the basis of age in violation of the Age Discrimination in Employment Act. The class action settlement, which was announced in a Press Release issued by the EEOC on January 30, 2003, requires the CPERS to pay $50 million in retroactive benefits to public safety workers whose job injuries qualified them for disability pay and to pay $200 million in increments over the lifetimes of the individual recipients.

Record Number of Age Discrimination Claims Filed with EEOC

According to the U.S. Equal Employment Opportunity Commission's statistics for Age Discrimination in Employment Act charges filed for the fiscal years 1992 through 2002, the number of age discrimination charges filed with the EEOC in 2002 reached nearly 20,000, the highest number of charges ever filed with the EEOC in a single fiscal year. The record number of charges filed in 2002 represents an increase of 14.5% over the 17,405 charges filed in 2001 and marks the third consecutive year that the number of charges increased from the previous year.

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