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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Supervisor's Age-Based Comments Provide Direct Evidence of Age Discrimination

In Fakete v. Aetna, Inc. (10/24/02) the U.S. Court of Appeals for the Third Circuit ruled that evidence that Stephen Fakete's supervisor told him that the company is "looking for younger single people" and that he "wouldn't be happy there in the future" provided direct evidence of age discrimination sufficient to warrant a jury trial. Fakete was 56 years old and 3 years away from becoming eligible to retire with a substantial pension. His supervisor terminated him on the grounds that he violated the terms of a prior written warning, had unexplained absences, falsified travel expense reports and failed to reimburse Aetna for personal phone calls. The trial court concluded without any analysis that the supervisor's statement was a "stray remark" that did not directly reflect the decision making process of Aetna's employment decision.

Lifting Restriction Did Not Support "Regarded as" ADA Claim

Mark Mack worked as an assistant trailer builder for Great Dane Trailers, which involved tasks requiring long periods of kneeling and squatting. After a month on the job, Mack developed pain in his leg. Great Dane's doctor released him to work with a permanent restriction of no kneeling or squatting and if he obtained a custom work boot. Great Dane told Mack that there were no positions within his restrictions and he was terminated 13 months after his disability leave began, pursuant to a company policy that provided for termination of an employee absent for more than one year. Mack sued Great Dane alleging violations of the Americans with Disabilities Act. A jury rendered a verdict in favor of Mack and Great Dane appealed.

In Mack v. Great Dane Trailers (10/22/02) the U.S. Court of Appeals for the Seventh Circuit reversed, ruling that although Mack's lifting restriction interfered with his work-related tasks, his restrictions did not rise to the level of a disability within the meaning of the ADA. The appeals court explained that an inability to perform occupation-specific tasks does not necessarily show an inability to perform the central functions of daily life. Accordingly, the appeals court dismissed Mack's ADA claim.

Court Orders Arbitration of Union's Claim under Expired Collective Bargaining Agreements

In Providence Journal Company v. Providence Newspaper Guild (10/21/02) the U.S. Court of Appeals for the First Circuit ruled that, although a collective bargaining agreement expired by its terms, the company and the union still were obligated to arbitrate disputes arising under the agreement. After expiration of a series of collective bargaining agreements between the Guild, and the Journal, the Journal notified the Guild that the dues check-off, union security, and arbitration provisions were no longer valid. The Guild sought to arbitrate under the expired agreement and invoked arbitration with the American Arbitration Association. The Journal filed a lawsuit to enjoin the AAA from processing the arbitration. In analyzing the expired collective bargaining agreement, the appeals court noted that the dues check-off and union security provisions clearly showed that the parties had intended that those provisions would survive the expiration of the agreement. Accordingly, the court determined that the Guild properly invoked arbitration to resolve those disputes.

Premium Compensation May Offset Overtime Due Only In the Same Workweek

Fabri-Centers of America owns and operates retail stores such as Jo-Ann Fabrics, Cloth World, and New York Fabrics. The U.S. Department of Labor sued Fabri-Centers under the Fair Labor Standards Act claiming that it failed to pay employees overtime. The trial court determined that Fabri-Center owed $545,000 but that it was entitled to an extra compensation credit of $113,000 under its compensation plan that allowed employees to earn premiums in excess of FLSA standards. The credit reduced the award to $432,000. The DOL, arguing that the premiums can only offset overtime due in the same work week, appealed.

In Herman v. Fabri-Centers of America, Inc. (10/17/02) the U.S. Court of Appeals for the Sixth Circuit ruled that, although there are conflicting court decisions, the better analysis is that an employer may only use premium compensation to offset overtime owed to employees within the same workweek as the missed overtime. Accordingly, the appeals court returned the case to the trial court to determine the amount of compensation credit, if any, that Fabri-Centers may claim on a pay period by pay period basis.

Court Enforces EEOC Subpoena to Determine If Law Firm Partners were Employees

The law firm Sidley & Austin was organized as a partnership with more than 500 partners. However, virtually all of the law firm's power resided in a small, unelected committee of 36 members. After the firm demoted 32 equity partners to counsel or senior counsel status, the U.S. Equal Employment Opportunity Commission investigated to determine whether the demotions violated the Age Discrimination in Employment Act. After failing to obtain all of the information it requested, the EEOC served a subpoena on the firm seeking information showing that the 32 former partners were employees before their demotion. The firm claimed that it gave the EEOC enough information to show that the 32 partners were "real" partners and that accordingly, the EEOC had no jurisdiction to continue its investigation. The EEOC disagreed and filed a lawsuit to enforce its subpoena.

In EEOC v. Sidley Austin Brown & Wood (10/24/02) the U.S. Court of Appeals for the Seventh Circuit ruled that the law firm must comply with the subpoena to allow the EEOC to complete its investigation to determine whether the former partners were real partners or whether they, because of the firm's structure and nature of relationships with workers, were employees covered by the ADEA. In determining that the law firm must comply with the subpoena, the appeals court noted that an individual classified as a partner-employer under state partnership law might be classified as an employee for purposes of the federal anti-discrimination laws.

Agency Manager Was an Employee, Not an Independent Contractor, under ADEA

In Jenkins v. Southern Farm Bureau Casualty (10/15/02) the U.S. Court of Appeals for the Eighth Circuit ruled that Leon Jenkins, an agency manager engaged in SFBC's business of selling insurance for 35 years, was an employee who could assert a claim of age discrimination under the Age Discrimination in Employment Act. Jenkins alleged that SFBC forced him to resign under a threat of termination and assigned his duties to two younger workers. SFBC alleged that Jenkins was an independent contractor according to his written contract and that he was asked to resign due to violations of company policies and inappropriate comments. The trial court found that Jenkins was an independent contractor and dismissed his lawsuit. Jenkins appealed. The appeals court determined that, although Jenkins signed a contract designating him as an independent contractor, exercised independent judgment about his solicitations, was paid on commission, and paid his own

taxes, there was enough evidence to show he was an employee. The appeals court noted that SFBC directed Jenkins's office locations and the hours he kept, paid for his utilities and office equipment, required him to maintain certain insurance coverage, provided him with a company-sponsored insurance plan, maintained ultimate authority over underwriting decisions, provided him access to the company's computers, required that he abide by the company's harassment policies, maintained authority to hire and fire all agents working for Jenkins, and that Jenkins had worked for SFBC for 35 years and that Jenkins's work was in the regular course of SFBC's business. Accordingly, the appeals court returned the case to the trial court for a trial.

Age-Based Comments by Non-Decisionmakers Do Not Support ADEA Claim

In Sandstad v. CB Richard Ellis, Inc. (10/28/02) the U.S. Court of Appeals for the Fifth Circuit ruled that age-related comments from persons not involved in the decision to terminate Kenneth Sandstad did not support his claim for age discrimination in violation of the Age Discrimination in Employment Act. Sandstad offered evidence that CB Richard Ellis implemented a plan designed to "identify 30 to 50 younger managers" for promotion to senior management for, "ultimately replacing senior management." Stock analysts remarked that the company had "too much grey hair" in senior management. When Sandstad was passed over for a promotion, he was told that the company decided to "skip a generation" in selecting another candidate. Sandstad was 52 when he was discharged for poor performance and lack of leadership. The appeals court affirmed dismissal of Sandstad's ADEA claim on the grounds that none of the speakers were responsible for his termination.

Over $1 Million Awarded against Medical Firm for H-1B Violations with its Doctors

The U.S. Department of Labor awarded over $1 million in back pay and assessed over $100,000 in civil money penalties in Administrator, Wage and Hour Division v. Kutty (10/9/02) against Mohan Kutty, M.D. d/b/a The Center For Internal Medicine and Pediatrics, Inc. for failing to pay 17 doctors employed in H-1B nonimmigrant status the wages set forth in their Labor Condition Applications; discriminating against nine of the doctors by discharging them, or constructively discharging them in retaliation for engaging in conduct protected by the Immigration and Nationality Act; and failing to maintain required documentation and make documents available for public inspection.

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