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Welcome to e-News: From the Labor, Employment and Benefits Group of Robinson & Cole

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ADEA Permits Claim for "Reverse" Age Discrimination

Dennis Cline, and 195 of his coworkers, sued their employer, General Dynamics Land Systems, for age discrimination in violation of the Age Discrimination in Employment Act after General Dynamics entered into a new collective bargaining agreement. The prior collective bargaining agreement provided full health benefits to retired workers who had accumulated 30 years of service. The new collective bargaining agreement provided full health benefits only to retired workers 50 years of age or older; other workers received reduced health benefits. The trial court dismissed the ADEA claim reasoning that ADEA aided older workers, not workers suffering age discrimination because they were too young. The workers appealed.

In [Cline v. General Dynamics Land Systems, Inc.](#) (7/22/02) the U.S. Court of Appeals for the Sixth Circuit ruled that the plain language of ADEA permits a claim for age discrimination affecting any employee over the age of 40, including a claim that older

workers received more favorable treatment than younger workers as long as those younger workers were also over 40 years of age. The appeals court explained that ADEA did not differentiate between workers over the age of 40 and older workers. As explained by the appeals court, the fact that some members within the protected class were beneficiaries of the discriminatory action of which other members of the protected class were victims does not somehow suspend the language of ADEA, which prohibits age discrimination against *any* person within the protected class. Accordingly, the appeals court returned the case to the trial court for further proceedings.

Employee Terminated for Discussing Fairness of Bonus System May Bring Public Policy Wrongful Termination Claim

Sharron Grant-Burton worked as the marketing director at an assisted-living facility owned by Covenant Care. Grant-Burton attended a corporate meeting of Covenant Care's marketing directors and, during the meeting, participated in discussions about bonuses. Some of the marketing directors had not received bonuses and were surprised to learn that others had received them. Six days later, Covenant Care discharged Grant-Burton for her comments at the meeting. Grant-Burton sued Covenant Care claiming wrongful termination in violation of public policy. The trial court dismissed Grant-Burton's claims and she appealed.

In [Grant-Burton v. Covenant Care, Inc.](#) (7/10/02) the California Court of Appeals reversed the trial court's dismissal, ruling that Grant-Burton had properly asserted a claim for public policy wrongful termination. The appeals court focused on the California labor code which provides that no employer may discharge any employee who discloses the amount of his or her wages and on the National Labor Relations Act which provides that communications by employees concerning wages is protected concerted activity. Because the appeals court found that Grant-Burton had submitted enough evidence to establish a claim for public policy wrongful discharge, the appeals court reinstated her case and returned it to the lower court for a trial.

Reassignment without Changing Salary, Benefits, Title or Work Is Not Adverse Employment Action for Claims under Title VII or ADEA

Barbara Policastro worked for Northwest Airlines as a sales representative in the Cincinnati and Louisville/Lexington metropolitan areas. Northwest formed a strategic alliance with KLM Airlines and, as part of the alliance, restructured Policastro's sales territory. As a result of the restructuring, Policastro serviced customers exclusively in the Louisville/Lexington metropolitan area. The change was based on the fact that she was experienced in sales, that she already spent nearly half of her time in the region, that she had a strong contact base in the region, that her largest account was in Louisville, that she was better suited than other workers for opportunities in the region, and that the assignment had the potential for advancing her career. But Policastro was unhappy with the reassignment because she had a longer commute, she was required to stay in the region more days per

week, and she lost the ability to maintain relationships with her Cincinnati customers. Within one year, Policastro, age 45, submitted her resignation, citing her territory modification and budget concerns as reasons for her resignation. She then sued Northwest Airlines alleging sex discrimination in violation of Title VII and age discrimination in violation of the Age Discrimination in Employment Act, claiming she was constructively discharged as a result of her territory modification. The trial court dismissed her claims because she did not prove that she suffered any adverse employment action. Policastro appealed.

In [Policastro v. Northwest Airlines, Inc.](#) (7/29/02) the U.S. Court of Appeals for the Sixth Circuit affirmed the dismissal, ruling that Policastro failed to offer any evidence that she suffered a materially-adverse change in the terms or conditions of her employment because of Northwest's conduct. The appeals court explained that reassignments without changes in salary, benefits, title or work hours generally do not constitute adverse employment actions. The court further explained that Policastro's subjective impressions were irrelevant and that a reasonable person would not find the change in territory objectively intolerable. The court noted that her reassignment did not involve any reduction in salary, decrease in benefits, diminution in responsibilities, modification of her title, or increase in the size of her territory, and the reassignment was expected to advance her career.

Employer Has Burden of Proving Defense that Employee on FMLA Leave Would Have Been Discharged Regardless of Exercising Her Rights under FMLA

In [Smith v. Diffe Ford-Lincoln-Mercury, Inc.](#) (7/29/02) the U.S. Court of Appeals for the Tenth Circuit ruled that an employer that discharges an employee on leave under the Family and Medical Leave Act bears the burden of proving that the discharge was for reasons unrelated to the FMLA leave in order to avoid claims of discrimination or retaliation under the FMLA. Diantha Smith worked for Diffe preparing warranty and repair orders for payment. Smith was diagnosed with breast cancer and required two month medical leave for treatment. During Smith's absence, Diffe decided that Smith had not adequately trained a junior employee. Two weeks before Smith was scheduled to return to work, Diffe terminated her employment. Smith sued Diffe under the FMLA and the Americans with Disabilities Act. The trial court dismissed Smith's ADA claim and, after a jury trial, awarded Smith \$125,000 damages plus attorney's fees on her FMLA claim. Smith and Diffe appealed.

Diffe argued on appeal that the trial court improperly required it to prove that Smith was discharged for reasons unrelated to her FMLA leave rather than Smith being required to prove that Diffe discharged her for reasons related to her FMLA leave. The appeals court, acknowledging a split among the federal courts, relied on a U.S. Department of Labor regulation that put the burden on the employer to show that the discharge was for reasons unrelated to the FMLA leave. The appeals court explained that, because the FMLA requires that an employer's duty to continue FMLA leave, maintain group health plan benefits and restore the employee all cease at the time an employee is discharged, the burden of proving

grounds for a legal discharge should rest with the employer. Accordingly, the appeals court refused to grant Diffie a new trial.

In addition, the appeals court reversed dismissal of Smith's ADA claim on the ground that her request for FMLA leave amounted to a request for reasonable accommodation of her disability. Because Diffie failed to provide Smith with a reasonable accommodation of FMLA leave, the appeals court ruled that Diffie violated the ADA. As a result, the appeals court returned the case to the trial court for a trial on Smith's ADA claims.

Arbitration Agreement Containing Attorneys' Fees Provision Ruled Unenforceable

Gloria McCaskill, an African-American female, was employed at Evergreen Cemetery where she sold funeral goods and services. After being employed for one year, McCaskill was presented with an arbitration agreement that she was required to sign as a condition of continued employment. The agreement provided that disputes would be decided by binding arbitration and that each party would bear his or her own legal fees and costs. Later, McCaskill complained to management on behalf of several other female employees about sexual harassment by a male supervisor and also complained that she had not received sales bonuses. A short time later, McCaskill's employment was terminated. She sued Evergreen's parent, SCI Management, for discrimination under Title VII and Section 1981. At SCI's request, the trial court dismissed her complaint and ordered arbitration. McCaskill appealed.

In [McCaskill v. SCI Management Corporation](#) (8/5/02) the U.S. Court of Appeals for the Seventh Circuit ruled that an arbitration agreement that requires each party to pay for its own costs and attorney's fees regardless of the outcome of the arbitration interferes with the ability of an employee to effectively vindicate her rights under Title VII and, is therefore, unenforceable. A concurring circuit judge pointed out that under Title VII a plaintiff acts as a private attorney general in order to vindicate the important government policy of eradicating discrimination and, therefore, the right to recover attorney's fees under Title VII is central to the ability of persons seeking redress from violations of Title VII.

Legality of Arbitration Policy in Handbook Questioned

Susan Brooks worked for Aetna Property and Casualty for 19 years, until it was acquired by Travelers Insurance Company, where she continued as an employee. Brooks was diagnosed with rheumatoid arthritis and underwent bilateral hip replacement surgery. The disease left visible deformities in her hands and feet. She later suffered a severe fracture in her arm, suffered severe back spasms, and developed bursitis in her knee. By the end of the year, Travelers terminated Brooks's employment, citing the reorganization of her division as the reason. Brooks was 43 years old at the time of her termination. Brooks sued Travelers claiming age and disability discrimination in violation of the Age Discrimination in Employment Act and the Americans with Disabilities Act. She also claimed that Travelers denied her disability benefits in violation of the Employment Retirement Income Security

After Travelers acquired Aetna, Travelers distributed an employee handbook to all former Aetna employees. The handbook contained an arbitration provision. Based on the arbitration provision, Travelers asked the trial court to compel arbitration and to dismiss Brooks's lawsuit. Brooks claimed that the arbitration policy was unenforceable. The trial court found that Brooks's signature accepting the arbitration policy effectively waived her rights to proceed in court and ordered arbitration. Brooks appealed.

In [Brooks v. Travelers Insurance Company](#) (7/25/02), the U.S. Court of Appeals for the Second Circuit dismissed Brooks's appeal and vacated the trial court's ruling after Travelers, during the course of the appeal, abandoned its claim that Brooks was required to arbitrate her disputes. Nevertheless, the appeals court expressed concerns about the legality of Travelers' arbitration policy. The policy provided that the arbitration hearing should be completed within one day unless, in unusual circumstances and for good cause shown, the arbitrator schedules an additional day. The appeals court noted that many lawsuits under the federal employment discrimination statutes exceed two days, that the time spent presenting evidence is not within the employee's exclusive control because Travelers could object and cross-examine witnesses and that the arbitrator could unfairly limit the presentation of the employee's evidence. The arbitration policy also limited damages to direct injuries, allowed reinstatement of the employee only if money damages were insufficient as a remedy, and prohibited any award of punitive damages, injunctive relief, or attorneys' fees unless expressly provided by statute. The appeals court noted that these provisions effectively barred an employee from vindicating his or her federal statutory rights. Finally, the policy provided that each side must pay its own legal fees and expenses. The appeals court noted that the policy contravened federal discrimination statutes that expressly provide for recovery of attorneys' fees and costs to a prevailing employee.

Title VII Mixed-Motive Claims Explained

In [Costa v. Desert Palace, Inc.](#) (8/2/02) the U.S. Court of Appeals for the Ninth Circuit analyzed decades of conflicting federal court decisions on the burdens of proof and jury instructions applicable in mixed-motive discrimination claims under Title VII. Mixed-motive claims are discrimination claims resulting from an adverse employment action based on a combination of discriminatory and legitimate factors.

Catharina Costa was the only woman member of her Teamsters bargaining unit working at Caesars Palace Hotel and Casino. She worked in a warehouse operating forklifts and pallet jacks. Over time, Costa was subjected to a myriad of incidents resulting in her discharge. She offered evidence that she was reprimanded for missing work for medical reasons while males were not; that she was stalked by a male supervisor; that she was warned and suspended for allegedly misusing equipment and for using profanity while males were not; that supervisors stacked her disciplinary record by issuing multiple warnings and including incidents dating back many months while males were not; that she was regularly assigned less overtime than males; that she was subjected to sexual stereotyping and called a number

of sexual epithets; that she was subjected to physical altercations with her male coworkers and disproportionately disciplined; and that her veracity was challenged despite corroborating evidence supporting her claims. Costa sued for sexual harassment under Title VII. After a trial, a jury returned a verdict in her favor for \$65,000 back pay, \$200,000 compensatory damages, and \$100,000 punitive damages. The trial judge reduced the compensatory damages to \$100,000 and entered judgment for \$265,000 plus attorney's fees.

On appeal, Caesars argued that the trial judge did not properly instruct the jury on Costa's Title VII claim. After analyzing many court cases, each imposing a judicial gloss on the requirements of Title VII, the appeals court turned to the plain language of Title VII. As a result of its analysis, the appeals court ruled that if a trial court determines that the only reasonable conclusion a jury could reach is that discriminatory animus is the sole cause for a challenged employment action or that discrimination played no role at all in the employer's action, then the jury should be instructed to determine whether the challenged action was taken because of a discriminatory reason. If the jury determines that the employer acted because of a discriminatory reason, the employee prevails and may receive all remedies available under Title VII. If not, the employer prevails. The appeals court also ruled that, if the evidence supports a finding that discrimination is one of two or more reasons for the challenged decision, at least one of which may be legitimate, then the jury should be instructed to determine first whether the discriminatory reason was a motivating factor in the challenged action. If the jury answers in the affirmative, then the employer has violated Title VII. However, if the jury finds that the employer proved that it would have made the same decision, then the employer escapes the imposition of damages and any order of reinstatement and is liable solely for attorney's fees, declaratory relief, and an order prohibiting future discriminatory actions. Based on its analysis, the appeals court determined that the trial court properly had instructed the jury.

DOL Advises that Military Service Time Counts toward FMLA Eligibility

The U.S. Department of Labor issued a [News Release](#) (7/30/02) reminding employers that workers in the National Guard and Reserves returning to civilian occupations after serving in support of President Bush's post September 11 national emergency declaration should have their active duty time counted towards their eligibility to take time off from work under the Family and Medical Leave Act. According to a memorandum issued by the DOL, the Uniformed Services Employment and Reemployment Rights Act entitles returning service members to all benefits of employment they would have received had they been continuously employed. According to the DOL, under USERRA employers should count the months and hours that National Guards or Reservists would have worked had they not been called up for military service and count that time towards FMLA eligibility.

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