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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## FMLA Rights Not Triggered by Employee's Nonspecific Request for Family Leave

Joseph McCarron worked as an account executive for Yellow Book USA. In June of 1999, McCarron, who had taken a medical leave under the FMLA the previous year, left a voice mail message with a human resources manager requesting "family leave" to deal with a "family situation." The manager responded by sending McCarron the necessary FMLA paperwork. Upon receiving the paperwork, McCarron called the manager back, stated that he would not provide any more information, and demanded that he be left alone until his family situation was resolved. The manager left McCarron another message stating that she needed to discuss the situation to ensure that he was qualified for FMLA leave and informing him that an unauthorized three-day absence would be considered a resignation. A few weeks later, by which time McCarron had accumulated three days of unauthorized absences, McCarron was hospitalized for a bipolar episode. Yellow Book terminated his employment the following week, citing the unauthorized absences. After being released from the hospital approximately a week later, McCarron attempted to contact human

resources and to submit the required FMLA forms. Yellow Book refused to accept the forms, reiterated to McCarron that he was no longer an employee and asked him to cease contacting the company.

McCarron sued Yellow Book, alleging violation of the FMLA. However, in McCarron v. British Telecom (8/7/02), the U.S. District Court for the Eastern District of Pennsylvania dismissed the lawsuit in favor of Yellow Book, finding that McCarron's nonspecific request for "family leave," without further information until he attempted to return to work weeks later, was insufficient to trigger his right to leave under the FMLA. The court noted that the FMLA's regulations emphasize that it is an employer's responsibility to determine the applicability of the FMLA and to consider requested leave as FMLA leave, but found that McCarron did not provide Yellow Book with enough information to make such determination. More particularly, the court found that Yellow Book's attempts to obtain this information from McCarron were met by refusals by him to provide it. The court additionally rejected McCarron's argument that he had sufficiently remedied the situation by contacting Yellow Book and providing a qualifying reason for his leave after he was discharged from the hospital, finding that there was no medical evidence indicating that he could not have provided the required information in a timely and sufficiently detailed manner.

**Illegal Immigrant Can Sue For Back Pay For Work Already Performed**

Macon Singh was recruited by the C.D. & R Oil Company to travel from India to work in the United States. He lived in the United States illegally and worked for the C.D. & R for approximately three years, from 1995 to 1998, without receiving payment for his work. Singh filed a claim with the California labor commissioner seeking unpaid wages and overtime, which ultimately resulted in a settlement between Singh and C.D. & R. The day after the settlement papers were signed, the Immigration and Naturalization Service arrested and detained Singh. To date, Singh remains in INS custody.

In March of 2002, Singh sued C.D. & R for retaliation under the Fair Labor Standards Act, alleging that the company alerted INS to his illegal presence in the United States in retaliation for having filed a claim with the labor commissioner. Relying on the U.S. Supreme Court's decision earlier this year in Hoffman Plastic Compounds Inc. v. NLRB (reported in our 4/08/02 edition of e-News), which held that back pay is not available for undocumented workers who sue their employers for violations under the National Labor Relations Act, C.D. & R moved to dismiss the lawsuit. However, in Singh v. Jutla & C.D. & R Oil Co. (8/2/02), the U.S. District Court for the District of California distinguished the case from Hoffman and permitted the lawsuit to proceed. The court explained that the Supreme Court in Hoffman emphasized that awarding back pay for work "not performed" runs counter to immigration policy. In this instance, however, Singh's claim sought payment for work he had already performed. The court determined that prohibiting a plaintiff from bringing a claim for work already performed would provide a "perverse economic incentive" to employers to seek out and knowingly hire illegal workers in direct

contravention of immigration laws.

**Beer Distributor in Interstate Commerce Not Required to Pay Delivery Driver Overtime**

Michael Bilyou worked for 13 years as a delivery route driver for Dutchess Beer Distributors. After he was discharged, he sued Dutchess, claiming that he regularly worked more than 40 hours per week and therefore was entitled to overtime under the Fair Labor Standards Act. Dutchess asserted that the overtime pay requirements of the FLSA did not apply to Bilyou because he was engaged in transporting goods in interstate commerce. Bilyou responded that his delivery routes covered points solely in New York and so was not engaged in interstate commerce. The trial court agreed with Dutchess and dismissed Bilyou's claim. Bilyou appealed.

In Bilyou v. Dutchess Beer Distributors, Inc. (8/7/02), the U.S. Court of Appeals for the Second Circuit affirmed the trial court's dismissal of the action, explaining that, even if a carrier's transportation does not cross state lines, the interstate commerce requirement is satisfied if the goods being transported within the borders of one state are involved in a practical continuity of movement in the flow of interstate commerce. The appeals court noted that Dutchess exported empty containers to out-of-state points and that Bilyou regularly picked up empty containers and transported them to a facility for further shipment outside of New York. Bilyou's segment of the transportation of the empty containers was, therefore, part of the interstate movement of goods and rendered the FLSA inapplicable to him.

**MCAD Filing Period Increased to 300 Days**

On August 7, 2002, Massachusetts enacted a new statute extending the deadline for complainants to file claims of discrimination with the Massachusetts Commission Against Discrimination from six months to 300 days. The statute was enacted in response to three 1996 rulings by the Massachusetts Supreme Judicial Court in which sexual harassment claims were found to be untimely. The 300-day limit is the same limitation imposed by federal antidiscrimination statutes. The new deadline will become effective November 6, 2002.

**Dispute Concerning Scope of Union's Seniority Rights Required Arbitration**

Air Products & Chemicals, a unionized chemical company, constructed a power plant adjacent to its existing chemical plant. The two facilities were managed independently and were within distinct operating groups of Air Product's corporate structure. Nevertheless, union members at the chemical plant attempted to exercise seniority rights to the new jobs at the power plant. Air Products refused these attempts and the union filed a grievance, alleging that the company violated their collective bargaining agreement by refusing to

permit union members to use their seniority rights to bid on jobs. Air Products denied the grievance, asserting that the union members had no contractual right to jobs at the power plant because it was not part of the chemical plant and, therefore, not within the scope of the collective bargaining agreement. Air Products rejected the union's attempt to arbitrate the dispute. The union sued in federal court seeking to compel arbitration, as it believed it was entitled to under the collective bargaining agreement.

The trial court ruled in favor of Air Products, deciding that the union's breach of contract claim raised issues of representation because the union asserted that the scope of the collective bargaining agreement covered the power plant. Having found the matter was essentially a representation issue, the trial court then concluded that the dispute was within the exclusive jurisdiction of the National Labor Relation Board and, therefore, was not subject to arbitration. The union appealed the court's decision.

In Paper, Allied-Industrial, Chemical & Energy Workers International Union, Local 5-0550 v. Air Products & Chemicals, Inc. (8/12/02), the U.S. Court of Appeals for the Sixth Circuit reversed the trial court's decision and ordered arbitration of the matter. The appeals court rejected the trial court's finding that the matter was essentially a representation issue, determining instead that the case was primarily one of contract interpretation that potentially implicated representational issues. The appeals court explained that the collective bargaining agreement, on its face, provided for arbitration over seniority issues. Thus, where neither the union nor Air Products had sought to invoke the powers of the NLRB, the appeals court ruled that a federal court may properly exercise its jurisdiction over the matter. Moreover, pursuant to the grievance procedures contained in the collective bargaining agreement, the appeals court concluded that the matter was properly before an arbitrator, who could decide whether the language of the collective bargaining agreement afforded seniority rights with respect to the jobs at the power plant.

**Female Supervisor's Advances to Gay Subordinate Did Not Constitute Sexual Harassment**

Travis Walker, who is gay, worked as a claims collector for National Revenue. Walker alleged that his supervisor, Mary Quinones, made unwelcome sexual advances to him. Walker claimed that Quinones sat next to him, rubbed his legs, thighs, neck, and hair, and positioned herself in a manner that revealed her underwear. Walker stated that he told Quinones he was gay and not interested in her romantically, but that she responded that she could change him and recounted her sexual experiences. Walker maintained that after he rejected her advances, Quinones mistreated him by throwing paper at him, snapping his headset, hitting him with a plastic bag, and threatening to send him home, which caused him stomach pain, anxiety attacks, and depression. After complaining to National's human resources department, Walker was granted a transfer to another supervisor. Walker claimed that following the transfer, Quinones continued to glare at and stalk him.

Walker sued National alleging sexual harassment and retaliation. He nonetheless continued

working at National for the next eight months, increasing his production and approximately doubling his income. Two years later, he took a month-long leave of absence because of pain, anxiety and depression, and resigned from employment upon his return.

The trial court dismissed Walker's lawsuit, finding that Quinones's alleged conduct was not severe or pervasive enough to constitute sexual harassment under Title VII. Walker appealed. In Walker v. National Revenue Corporation (8/1/02), the U.S. Court of Appeals for the Sixth Circuit upheld the dismissal in favor of National. The appeals court agreed that the alleged conduct, while unpleasant, lacked the severity or pervasiveness necessary for an actionable sexual harassment claim. The appeals court acknowledged that Quinones was the type of supervisor for whom no employee wanted to work, that she acted in a juvenile and irrational manner on occasion, and that she was at best inconsiderate and at worst cruel, but concluded that the conduct was not so egregious as to alter the conditions of Walker's employment. The appeals court also found no evidence of retaliation, noting that Walker's income increased as a result of his transfer.

**Separation Release Barred Sexual Harassment Claim**

Lori Smith worked for Amedisys for less than a year, during which time she claimed she was sexually harassed by her supervisor, Promod Seth, who was the company's Chief Operations Officer. Smith alleged that Seth put his arms around her in front of other employees, requested that she accompany him to dinner and for drinks, touched her hands at dinner, and touched her leg and held her hand while she was driving with him in a car. She also alleged that Seth made unwelcome sexual advances while on business trips, including visiting Smith's hotel room and kissing her. He also allegedly asked her to wear short skirts, low-cut blouses, tighter fitting clothes and high heels to improve sales for the company. Smith never officially complained about the alleged harassment, stating that she attempted to brush off Seth's advances.

After Amedisys received complaints about Smith's job performance, the company's Chief Executive Officer asked her to resign and offered her a severance package as part of a separation agreement. The agreement included a release of any and all employment-related claims against Amedisys. Smith agreed to resign, signed the separation agreement, and accepted the severance payment.

Nevertheless, Smith sued Amedisys for sexual harassment. The trial court dismissed the lawsuit, ruling that Smith had waived her rights to bring the lawsuit when she signed the separation agreement. Smith appealed, asserting that because the agreement did not expressly reference the terms "Title VII" or "federal claims" she did not knowingly and voluntarily waive her right to sue on grounds of sexual harassment. In Smith v. Amedisys, Inc. (7/26/02), the U.S. Court of Appeals for the Fifth Circuit denied Smith's appeal and affirmed the ruling in favor of Amedisys. The appeals court ruled that the scope of the separation agreement was stated in plain and simple language that made it easy to understand that a sexual harassment claim would be barred. The appeals court noted that

Smith was a high school graduate, had completed a business administration course, had taken accounting courses at a university, and that part of her responsibilities at Amedisys involved working with contracts.

**Blacklisting Claim Dismissed for Lack of Evidence**

In Chertkova v. Connecticut General Life Insurance Company (7/12/02), the Connecticut Superior Court dismissed claims filed by Stella Chertkova against her former employer, Connecticut General, alleging that Connecticut General blacklisted her in violation of Connecticut law. Chertkova claimed that following her termination of employment with Connecticut General she was hired by other employers and that she later was terminated by two of those employers and almost terminated by a third after Connecticut General persuaded them to terminate her employment. Specifically, she claims that Connecticut General described her as a trouble-maker, poor communicator, and frivolous litigator. Although Chertkova established that Connecticut General provided health insurance and related services to her subsequent employers, that during her lawsuit Connecticut General learned of the work she did for her subsequent employers, and that an executive at one of her subsequent employers formerly worked for Connecticut General, those assertions were insufficient to show that Connecticut General had blacklisted her. Chertkova failed to offer any specific evidence showing that a particular person communicated information about Chertkova to her employers. In the absence of any evidence, the court dismissed Chertkova's claim.

For more information, please contact us


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