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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Former Executive's Entitlement to Stock Options Presents Question for Jury

Edward Lucente worked for IBM for 30 years. As an executive employee, Lucente participated in IBM's stock plans. Those plans contained "forfeiture-for-competition" provisions that permit IBM to cancel unexercised stock options and restricted stock if the employee leaves to work for a competitor. Lucente left IBM and took a job with Northern Telecom, which IBM assured him was not a competitor. Upon leaving, Lucente received $675,000 in severance pay. Two years later, Lucente left Northern Telecom to work for Digital Equipment Corporation. IBM cancelled Lucente's outstanding stock options and restricted stock awards because it deemed DEC a competitive employer. Lucente sued IBM and IBM counterclaimed to recover the $675,000 severance payment. The trial court ruled that IBM's forfeiture-for-competition clause was unreasonable, dismissed IBM's counterclaim, and awarded Lucente $6 million in damages. IBM appealed.

In Lucente v. International Business Machines Corporation (11/4/02), the U.S. Court of

Appeals for the Second Circuit reversed, explaining that, if Lucente had voluntarily left the company, New York's "employee choice doctrine" would preclude him from challenging the enforceability of the forfeiture-for-competition clause. Under that doctrine, an employee who voluntarily leaves an employer is assumed to have made an informed choice between forfeiting benefits and retaining benefits by avoiding competitive employment. The appeals court noted that, by concluding that Lucente was fired, the trial court improperly ignored evidence that Lucente's departure from IBM was voluntary, an issue that must be decided by a jury.

Discipline Procedures in Hospital's Employee Handbook May Create Enforceable Contract

Marolyn Baril worked as an emergency room nurse at Aiken Regional Medical Centers. The hospital added a new disciplinary policy to its employee handbook. Under the policy, only offenses such as dishonesty, fraud, theft of any amount, or unauthorized removal of hospital property could result in immediate termination. The hospital learned that Baril made a 32-second long-distance telephone call to her sister on the hospital's toll-free line. Baril offered to pay for the call, but the hospital refused and terminated her employment. Baril sued the hospital for breach of contract. The trial court dismissed the lawsuit, finding that handbook did not create a contract and that Baril was an at-will employee who the hospital could terminate at any time. The trial court relied on the handbook's disclaimer language, stating that the handbook "does not constitute a contract" and "does not operate to change the at-will nature of employment to a contractual relationship." Baril appealed.

In Baril v. Aiken Regional Medical Centers (10/28/02), the South Carolina Court of Appeals reversed the dismissal and permitted the lawsuit to proceed. The appeals court explained that, notwithstanding the handbook's disclaimer language, the hospital's policy concerning discipline was couched in mandatory terms, including assurances that the procedures would be followed. The appeals court also noted that the ambiguity resulting from the presence of both the disclaimer and promissory language created a jury question as to whether the handbook constituted an enforceable employment contract.

Loss of Prestige Not Adverse Employment Action under Title VII

Samuel Forkkio, who is African-American, sued the Federal Deposit Insurance Corporation, alleging that it discriminated against him on account of race in violation of Title VII by removing him from his section chief position during a reorganization. He claims that he received unfavorable treatment in comparison to sex similarly-situated white section chiefs. While Forkkio was placed in a lower grade position, his pay was not reduced and he continued to perform his same job duties. The trial court dismissed his lawsuit, reasoning that Forkkio had not suffered any actionable adverse employment action. Forkkio appealed.

In Forkkio v. Powell (10/18/02), the U.S. Court of Appeals for the D.C. Circuit upheld the dismissal, agreeing that Forkkio had not alleged any actionable adverse employment action.

The appeals court explained that actions short of firing can be adverse within the meaning of Title VII, but that not all lesser actions by employers count. Noting that Forkkio essentially alleged a loss of prestige, the appeals court explained that purely subjective injuries, such as dissatisfaction with a reassignment, public humiliation, or loss of reputation are not adverse employment actions. The appeals court concluded that the FDIC's actions may have caused Forkkio subjective injury but they did not objectively harm his working conditions.

HIV-Positive Employee Not Disabled under ADA

Albenjamin Blanks, who worked for Southwestern Bell, went out on short-term disability leave because of depression and work-related stress. During that leave, he was diagnosed with asymptomatic HIV and began medical treatment. His doctor released him to return to work, but recommended that he be transferred to a less stressful position. SBC transferred Blanks to a position that paid $100 less per week than his former position. Blanks resigned his employment two weeks later and sued SBC alleging violation of the Americans with Disabilities Act. The trial court dismissed his lawsuit, finding that Blanks could not show that he was disabled under the ADA. Blanks appealed.

In Blanks v. Southwestern Bell Communications, Inc. (11/4/02), the U.S. Court of Appeals for the Fifth Circuit upheld the dismissal, ruling that Blanks's HIV-positive status did not constitute a disability under the ADA. The appeals court acknowledged that asymptomatic HIV qualifies as a physical impairment from the moment of infection and that HIV substantially limits the major life activity of reproduction. However, the appeals court ruled that evidence that Blanks and his wife did not want more children precluded him from claiming that his major life activity of reproduction was substantially limited by HIV. Accordingly, Blanks was not a qualified individual with a disability entitled to protection under the ADA.

Retaliation Claim Relates Back to Original Claims of Discrimination

Daniel Ackah, who is African-American and a native of Ghana, filed a claim of race and national origin discrimination against his employer, Hershey Foods Corporation. Two years later, while Ackah's discrimination claims were pending, Hershey terminated Ackah's employment. A year later, Ackah filed another claim, alleging that he was terminated in retaliation for filing the initial claims. Ackah filed a complaint in federal court, alleging claims of race and national origin discrimination and retaliation. Hershey argued that the retaliation claim was untimely because Ackah failed to file his retaliation claim within the 180-day filing period under Pennsylvania law.

In Ackah v. Hershey Foods Corp. (11/1/02), the U.S. District Court for Pennsylvania ruled that Ackah's retaliation claim, although filed after the expiration of the required filing period, was timely because its allegations related back to his claims asserted in the initial complaint. The court found that the retaliation allegations fairly encompassed the

discrimination allegations and fell within the scope of the prior complaint. The court also noted that the discrimination and retaliation complaints were based on the same theories of discrimination. Finally, the court noted that the underlying purpose of requiring complainants to file timely administrative claims before filing in court is to provide government agencies the opportunity to settle disputes, which happened in this case.

U.S. Supreme Court Lets Stand Decision Allowing Unions to Charge Costs to Non-Members

In Mulder v. NLRB (11/12/02), the U.S. Supreme Court let stand a decision by the U.S. Court of Appeals for the Ninth Circuit allowing unions to charge non-members covered by a union security clause for the costs of organizing bargaining units in the same competitive market. Employees who were not members of unions claimed that it was an unfair labor practice for unions to charge them for organizing costs. The National Labor Relations Board decided that organizing costs may be properly charged to non-members under the National Labor Relations Act where there is a direct, positive relationship between the wage levels of union-represented employees and the levels of the employees of other employers in the same competitive market. The non-member employees appealed to the Ninth Circuit, which confirmed that, under the NLRA, a union serving as a bargaining unit's exclusive bargaining representative may charge all employees -- members and non-members alike -- the costs involved in organizing, at least when the organizing employees are within the same competitive market as the bargaining unit employer. The non-member employees appealed to the U.S. Supreme Court, but the court declined to hear the case and allowed the Ninth Circuit's decision to stand.

Jury Awards Hospital Employee Nearly $12 Million for FMLA Violations

Chris Schultz worked for Advocate Health and Hospitals Corporation as a hospital maintenance technician for 26 years. Shultz requested unpaid leave under the Family and Medical Leave Act to provide occasional care for both his mother, who suffered from heart disease and diabetes, and his father, who suffered from Alzheimer's disease. The hospital terminated Shultz's employment, asserting that he failed to meet his job standards. Shultz sued the hospital, claiming that his purported failure to meet job standards did not account for his FMLA leave and that his termination was in retaliation for taking FMLA leave. In Shultz v. Advocate Health and Hospitals Corp. (10/30/02), a jury in the U.S. District Court in Illinois found in Schultz's favor and awarded him $750,000 in compensatory damages and $10 million in punitive damages. The jury also held Schultz's two supervisors individually liable and awarded compensatory damages of $200,000 and punitive damages of $250,000 each against of them. The district court must still consider additional damages under the FMLA, including attorneys' fees and costs.

President Bush Signs Jobs for Veterans Act

On November 7, 2002, President Bush signed into law the Jobs for Veterans Act which directs the U.S. Secretary of Labor to develop a national employment rate for veterans. The development of a veterans' employment rate is part of a federal endeavor to improve the overall quality of veterans' job training and placement services at state employment agencies. Under the Act, states that provide the highest quality of service or make significant improvements will receive additional federal funding. The Act also enables the federal government to implement corrective action plans in states with poor veterans' employment rates.

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