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

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Former Store Manager Obtains \$500,000 Jury Verdict in Age Discrimination Claim Despite Evidence of Declining Sales and Failure to Meet Performance Goals

Dorman Hartley was employed as a manager of a Dillard's store in Arkansas. In mid-1995, sales began to decline at that store and Hartley was unable to meet the sales and profit goals in 1997, 1998 and early 1999. In 1999 he was discharged for unsatisfactory job performance and was replaced by a 32-year old manager. At the time of his discharge, Hartley was 64 years old. He sued Dillard's for age discrimination in violation of the Age Discrimination in Employment Act. Dillard's argued that the termination was due to poor performance as evidenced by Hartley's failure to meet sales goals for almost three years. However, Hartley presented the testimony of an economist to show that stores in malls had been losing business to "big box" stores like Wal-Mart and Home Depot. Hartley also presented testimony that other Dillard's managers who had declining sales were transferred, not discharged. Hartley presented testimony of an operations manager who had been instructed by a corporate vice president to "go out and hire some young guys" and another manager

who was told to remove two older women from their management jobs. The jury found that Dillard's had willfully discriminated against Hartley due to his age and awarded him over \$500,000 in damages. Dillard's appealed the jury verdict claiming that the trial court improperly instructed the jury that it could disbelieve Dillard's reason for the discharge if age was "a" determining factor instead of "the" determining factor. In [Hartley v. Dillard's, Inc.](#) (11/18/02) the U.S. Court of Appeals for the Eighth Circuit, characterizing the error as harmless, rejected Dillard's appeal and upheld the jury award.

Court Affirms \$2.5 Million ADA Award by Apportioning Award to State Law Claim

Jane Gagliardo worked as a customer account representative for Connaught Laboratories when she was afflicted with multiple sclerosis. Her symptoms included muscle spasms, fatigue and numbness in her hands, legs and back. The fatigue affected Gagliardo's ability to think, focus and remember, and she began to make mistakes at work. Gagliardo's job included handling military orders and she requested to be relieved of this responsibility arguing that this task made it more difficult for her to do her other required work. Her request was never granted and Gagliardo continued to make mistakes. Connaught's human resources manager acknowledged that relieving Gagliardo from handling the military orders would have been a reasonable accommodation and that it was never done. Gagliardo continued to make mistakes and was eventually discharged for poor performance. She sued Connaught for disability discrimination under the Americans with Disabilities Act and the Pennsylvania Human Rights Act. Gagliardo prevailed at trial and was awarded \$2.5 million. On appeal, Connaught argued that the award should be reduced in accordance with the damages cap of the ADA, which limited damages to \$300,000.

In [Gagliardo v. Connaught Laboratories, Inc.](#) (11/22/02) the U.S. Court of Appeals for the Third Circuit rejected Connaught's argument and affirmed the jury award. While recognizing the ADA's damages cap, the court explained that the ADA explicitly prohibited limiting state remedies and, thus, the ADA did not bar the apportionment of damages between the capped federal ADA claim and the uncapped Pennsylvania's Human Rights Act claim to allow Gagliardo to get the maximum amount of the jury award that is legally available to her.

Married Team of Truck Drivers Not Engaged in Concerted Activity under NLRA

David and Bonnie Williams, a married couple, were hired by Watkins Motor Lines as a truck driving team. They were assigned to drive a tractor/trailer along the Missouri highway system. Missouri law prohibited driving tractor/trailers that weighed more than 80,000 pounds. The tractor assigned to the Williamses exceeded this limit and they requested a different vehicle. They were assigned to another vehicle, but it too exceeded the Missouri weight limit, and the Williamses declined to drive it. A week later, Watkins fired the Williamses for refusing an assigned load.

The Williamses sued Watkins for wrongful termination. Watkins claimed that the

Williamses' refusal to drive the vehicle was concerted activity under the National Labor Relations Act, and argued that their lawsuit was preempted by the NLRA and should be dismissed. The trial court agreed and dismissed the lawsuit. The Williamses appealed.

In [Williams v. Watkins Motor Lines, Inc.](#) (11/20/02) the U.S. Court of Appeals for the Eighth Circuit determined that concerted activity under the NLRA required "group activity," which meant that at least two employees had to be involved. Because the Williamses (even if two people) had been hired as a single unit, there was no concerted activity. The court also explained that their refusal to violate the weight limit law was not action taken for the benefit of Watkins' workers, and did not amount to concerted activity under the NLRA. Thus, the NLRA did not apply and the wrongful discharge action against Watkins was reinstated.

Massachusetts High Court Rules that Former Employee's Attorney in a Wrongful Termination Lawsuit May Contact Former Employees

After Ellen Patriarca filed a lawsuit for wrongful discharge against Center for Living & Working, the Center obtained a protective order from the court prohibiting Patriarca's lawyer from communicating with any former employee of the Center without the presence or permission of the Center's lawyers or without the permission of the court. Patriarca challenged that order. In [Patriarca v. Center for Living & Working, Inc.](#) (11/14/02) the Massachusetts Supreme Judicial Court lifted the protective order. The court explained that, to invoke the protection of the rule that prohibits a lawyer from communicating with a person known to be represented by another lawyer, the Center had to show that its former employees were actually represented by the Center's lawyer. To make that showing, the Center had to establish that the employees exercised managerial responsibility in the matter, were alleged to have committed the wrongful acts at issue in the litigation, or had authority on behalf of the Center to make decisions about the course of the litigation. Applying those standards to the former employees covered by the protective order issued in the Patriarca case, the court found them outside the scope of the rule and lifted the protective order.

Massachusetts Court Applies "Proprietary Interest Rule" to Determine if Workers Are Independent Contractors for Purposes of Unemployment Benefits

When Anthony DiMare left his courier job with Boston Bicycle Couriers he applied for unemployment benefits. The Massachusetts Division of Employment and Training determined that DiMare was entitled to unemployment compensation. BCC challenged that determination claiming that DiMare was an independent contractor, as evidenced by the Independent Contractor Agreement he had signed with BCC, and was, therefore, not entitled to unemployment benefits. In [Boston Bicycle Couriers, Inc. v. Deputy Director of the Division of Employment and Training](#) (11/18/02) the Massachusetts Appeals Court rejected BCC's claim. The court found that to establish that DiMare (and the other couriers working for BCC) were independent contractors, BCC had to show that: (1) the workers

were free from direction and control by the employer; (2) the workers performed services outside the usual course of, or places of business of, the employer; and (3) the workers were engaged in an independently established trade or business. Focusing on the third element, the court applied the “proprietary interest test” and ruled that since BCC had not established that DiMare performed other separate courier delivery work on his own behalf or that DiMare could operate a courier delivery business independent of BCC, BCC could not show that DiMare had a proprietary interest in a business entity that could have been sold or transferred. DiMare was deemed an employee and was eligible for unemployment benefits.

Massachusetts Court Rules that a Victim of Domestic Abuse May Sue for Wrongful Termination if Discharged for Attending Court Proceedings Related to the Abuse

Sophia Apessos worked as a newspaper reporter for Memorial Press Group. During her employment, she was physically and verbally abused by her husband, Gilbert Hernandez. After Apessos was beaten by her husband on a Saturday, she contacted the police. The police arrested Hernandez, charged him with assault and battery, and helped Apessos obtain a temporary abuse prevention order. On Monday, Apessos appeared in court to apply for an extension of the temporary order and to testify at Hernandez' arraignment for assault and battery and violation of the abuse prevention order. Apessos left a message for her supervisor on Saturday, informing him that she would not be at work on Monday because she had to attend to court proceedings. Apessos also spoke with her supervisor on Monday and explained that she would return to work the following day. On Tuesday, Apessos returned to work and was terminated. She sued Memorial for wrongful termination in violation of public policy.

In [Apessos v. Memorial Press Group](#) (10/30/02) the court refused to dismiss Apessos' wrongful termination claim. The court explained that Apessos' absence from work resulted from engaging in a legally authorized activity of cooperating with a law enforcement investigation and complying with the Massachusetts Abuse Prevention Statute which requires a victim to appear in court on the next available day following the granting of temporary relief. The court noted that the public policy interest was fundamental: the protection of a victim from physical and emotional violence and of her livelihood.

Competitor that Hired Executive Subject to Arbitration Agreement Had No Standing to Stay the Arbitration Proceedings

Nancy Duitch left her employment as President of One World Networks Integrated Technologies to work for competitor Buckhead Marketing and Distribution. Both companies market skin care products. When she joined One World, Duitch signed an employment agreement that contained an arbitration provision. She also signed a confidentiality agreement in which she agreed not to disclose certain proprietary information. After Duitch left One World, One World agreed to settle a dispute over her compensation by paying her \$175,000 over a period of time. A short time later, Buckhead began promoting a product that One World concluded was a “knock-off” of one of its

products. One World accused Duitch of violating the confidentiality agreement and stopped making the settlement payments. One World filed a lawsuit against Duitch and Buckhead for breach of contract and unfair competition. Duitch filed a demand for arbitration and One World filed counterclaims for breach of contract and unfair competition. An arbitrator ruled that both Duitch and One World were subject to arbitration. As a result, One World dismissed Duitch from the lawsuit. Buckhead, the only defendant in the lawsuit, then filed a motion to stay the lawsuit until after the arbitration. The trial court granted a stay and One World appealed. In [One World Networks Integrated Technologies, Inc. v. Duitch](#) (11/21/02), the California Court of Appeal ruled that Buckhead had no legal right to stay the arbitration proceeding as it was not a party to the arbitration agreement and was not involved in the controversy between Duitch and One World that was being arbitrated.

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