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

e-News is a bi-weekly electronic newsletter reporting on recent court decisions, new statutes and other timely and topical information. Where appropriate, e-News provides web links to databases where recipients can easily access the actual decisions, statutes or other information. Navigating e-News is just like navigating the web. To access a web link, simply position your cursor on the link and click your mouse. To return to e-News, hit the back button on your browser. To view back issues, click on the "e-News Archives" link on the masthead.

We hope you enjoy e-News. If you know of others who would enjoy receiving this online newsletter (or if you would like to discontinue receiving e-News), pleaseclick here and send us an e-mail message. If you would like certain information covered in future issues, please let us know. We welcome your feedback.

Time Waiting for Treatment Covered by FMLA

James Woodman worked for Miesel Sysco Food Service Company as a truck driver. While making a delivery, he began experiencing chest pains. Woodman called Miesel's dispatcher and advised him of his symptoms. Woodman drove to the hospital emergency room where he was given a physical exam and medication. He was told not to return to work until after he had a stress test, which was scheduled in ten days. Over the next few days, Woodman contacted Miesel's human resources department to discuss issues related to his stress test. Ten days later, Woodman delivered a doctor's note to Miesel stating that he should not work until the stress test was taken and evaluated. The stress test revealed no heart condition and Woodman was released to work the following day. Woodman learned, however, that he had been terminated a week earlier for unexcused absenteeism and because he took an absence of three successive days without a doctor's note. Woodman sued Miesel for violating the Family and Medical Leave Act. After trial, Woodman was awarded nearly $60,000 and reinstated to his job as a truck driver. Miesel appealed.

In Woodman v. Miesel Sysco Food Service Company (11/26/02), the Michigan Court of Appeals rejected Miesel's assertion that Woodman was not covered by the FMLA because he did not properly provide Miesel with notice of a serious health condition. The appeals court determined that Woodman's notice to Miesel by telephone was sufficient to put it on notice that he might qualify for FMLA leave. The appeals court also rejected Miesel's assertion that Woodman did not establish that he had a serious health condition for coverage under the FMLA. The court examined the FMLA's regulations and concluded that, although the tests ultimately revealed that Woodman did not have a serious heart condition, his absence nonetheless qualified under the FMLA because, following an emergency room visit, a healthcare provider determined that an extended leave of absence was necessary.

Court Reinstates Sex Harassment Case Based on Three Propositions for Sex by President

During a meeting between Cathey Quantock, an account supervisor for Shared Marketing Services, and Rick Lattanzio, its president, Lattanzio propositioned Quantock three times. He asked her for oral sex, then asked her to participate in a threesome, and then suggested they have phone sex. Quantock refused each request. One week later, Shared Marketing transferred Quantock to another position, with different responsibilities. The following month, Quantock resigned because of the harassment and change in position, which left her shocked, devastated and humiliated. She was treated by a medical doctor and a psychologist.

Quantock sued Shared Marketing for sexual harassment based on a hostile work environment under Title VII. The trial court dismissed her claims, finding that Lattanzio's propositions occurred on only one occasion, lasted only a few minutes, and were not accompanied by physical contact. Quantock appealed.

In Quantock v. Shared Marketing Services, Inc. (12/12/02) the U.S. Court of Appeals for the Seventh Circuit reversed, ruling that while Lattanzio's propositions were infrequent, his outright solicitation of numerous sex acts from Quantock was sufficiently severe to alter her terms of employment. In addition, she presented evidence that she reported his conduct to a supervisor, sought medical treatment, and felt humiliated by his actions.

Court Allows Retaliation Lawsuit against Daycare Provider to Proceed to Trial and Awards Damages for Failure to Provide COBRA Continuation Coverage

Maura O'Shea sued her employer, Childtime Childcare, Inc., a daycare provider, for retaliation based on her opposing Childtime's practice of prohibiting the hiring of male employees in violation of Title VII and for failing to notify her of her right to continue health insurance coverage under COBRA. O'Shea alleged that she was terminated after repeatedly complaining about statements by Childtime's female employees showing that Childtime did not want to hire male employees. Childtime sought to dismiss the lawsuit,

arguing that there was no evidence that Childtime engaged in a prohibited employment practice.

In O'Shea v. Childtime Childcare, Inc. (12/2/02) the U.S. District Court in New York allowed the case to proceed to trial. The court found that Childtime's vice president and area manager stated that they frowned on and were uncomfortable hiring male employees for the toddler room and that the vice president described having a male employee changing diapers as "a lawsuit waiting to happen." Childtime's vice president also directed that a male employee be transferred out of the toddler room and instructed another employee to tell a male applicant interviewing for a position in the toddler room that the position was filled even though that was untrue. The area manager also told O'Shea that she was uncomfortable hiring a male teacher for the toddler room. Based on these facts, the court agreed to let the case proceed to a trial.

In advance of trial, the court also awarded O'Shea $2,300 ($50 per day for a 46-day period) for damages under COBRA when O'Shea remained without health insurance coverage following her termination from Childtime. The court noted that O'Shea was prejudiced by Childtime's failure to give the required notice because, during that time, O'Shea was diagnosed with and treated three times for a gastrointestinal disorder.

Court Reverses Dismissal of Title VII Hostile Environment Claims under Continuing Violation Doctrine

Bonnie Jensen worked as a letter carrier for the U.S. Postal Service for more than 20 years. Jensen claims that four male letter carriers created a sexually hostile work environment in violation of Title VII. Jensen ceased actively working at the Postal Service due to the harassment and began outpatient psychiatric treatment. Although the Postal Service requires any discrimination complaint to be filed within 45 days, Jensen waited more than 45 days to file her claim. In her claim, she alleged that the Postal Service failed to take corrective action to remedy a hostile work environment. The district court determined that Jensen did not allege any incident in the 45-day period and so dismissed her claim. Jensen appealed, arguing that her claim was based on the Postal Service's continued failure to take remedial action under the continuing violation doctrine.

In Jensen v. Henderson (12/10/02) the U.S. Court of Appeals for the Eighth Circuit ruled that the district court erred by requiring that Jensen show a discrete act of discrimination within the 45-day period. As explained by the appeals court, Jensen's claim of discrimination extended beyond her last day of work to the time when Jensen was on leave. She contended that the Postal Service failed to take appropriate corrective action in response to her allegations of harassment and challenged the adequacy of the Postal Service's response, not her co-worker's behavior. Accordingly, the appeals court reinstated Jensen's claims.

Defamation Claim against Camp Counselor Proceeds to Trial

Stephen Moss, a former archery counselor at Camp Pemigewasset, a summer camp for boys, sued the camp's director for defamation. Moss alleged that the director falsely told another counselor that he had received a complaint about Moss "through the State of New Hampshire" concerning "inappropriate contact" with boys at the camp. Moss was not allowed to return to the camp the following summer. The district court dismissed Moss's lawsuit and he appealed.

In Moss v. Camp Pemigewasset, Inc. (11/26/02) the U.S. Court of Appeals for the First Circuit reversed, ruling that the camp director's statement about a complaint through the State of New Hampshire was actionable. The appeals court noted that the phrase "inappropriate contact" is a common euphuism for child abuse and, accordingly, the statement is capable of defamatory meaning.

Court Upholds Finding of Same-Sex Sexual Harassment

Allen Beach worked for Yellow Freight System, a trucking company engaged in freight transportation. After nearly 10 years, Beach began observing graffiti with his name written on walls of Yellow Freight's trailers. Phrases included "Al Beach sucks" and "Al Beach is gay." He complained about the graffiti and a Yellow Freight manager had the graffiti removed but no further action was taken. Beach saw additional graffiti over the next two years including more graphic and offensive graffiti. Beach and a co-worker listed the trailers containing the graffiti and provided all the trailer numbers to his supervisor. His supervisor did nothing to investigate the graffiti or direct anyone else to investigate it. Beach took 20 to 30 photos of the graffiti and gave the photos to Yellow Freight's operations manager. Although that particular graffiti was removed, no other response was taken. The graffiti proliferated and began appearing on more trailers, on forklifts, in stairwells, and in the bathroom of the terminals. The graffiti became more offensive and more profane. Customers and other employees asked Beach about the graffiti and it was found on 70% of Yellow Freight's trailers. Beach testified that he felt sick, degraded and demeaned by the graffiti. Over the next four years, Beach reported the graffiti to numerous other supervisors and to Yellow Freight's headquarters, but nobody took any action.

Beach sued Yellow Freight alleging same-sex sexual harassment. After a trial, the trial court awarded him $37,000 in compensatory damages for past and future mental anguish and for past and future individual counseling expenses, plus costs and attorney's fees. Yellow Freight appealed, arguing that the graffiti was neither subjectively offensive nor severe or pervasive harassment.

In Beach v. Yellow Freight System (11/29/02) the U.S. Court of Appeals for the Eighth Circuit ruled that Beach showed that the graffiti was subjectively offensive. Beach repeatedly complained to Yellow Freight management about the graffiti. He asked that it be stopped and its source be investigated. He took pictures of the graffiti to show management

and tried to remove the graffiti himself. He suffered psychological problems as a result of the graffiti. He testified that he felt degraded, demeaned, and humiliated by the graffiti. He had trouble getting out of bed to go to work in the morning, and he switched bathrooms to avoid seeing graphic sexual graffiti about himself on a daily basis. Accordingly, the appeals court agreed that the evidence supported that Beach had found the graffiti offensive.

Yellow Freight also argued that the trial court improperly blurred the distinction between sexual and non-sexual graffiti and, when separated, did not establish severe or pervasive harassment. To the contrary, the appeals court agreed that there was sufficient evidence that the graffiti was of a graphic sexual nature and that Beach had repeatedly complained about it to his supervisors. The appeals court noted that 70% of Yellow Freights trailers contained graffiti, customers and other employees commented to Beach about the graffiti, and one customer even threatened to stop using Yellow Freight if the graffiti was not removed. Accordingly, the appeals court affirmed the trial court's ruling.

EEOC Issues New Guidance and Fact Sheet on National Origin Discrimination

On December 2, 2002, the U.S. Equal Employment Opportunity Commission issued an updated Guidance on the prohibition against national origin discrimination under Title VII. The Guidance explains the prohibition against national origin bias and emphasizes best practices aimed at fostering work environments free of discrimination. It addresses a wide range of issues that arise in claims of national origin discrimination, including hiring decisions, harassment, and language issues. The EEOC also created a Fact Sheet providing questions and answers to some common national origin matters faced by small employers.

In addition to the above links, these materials can be accessed at the EEOC's website at www.eeoc.gov.

For more information, please contact us

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