



ROBINSON & COLE LLP

Labor, Employment & Benefits



No Unemployment Benefits for Receptionist Terminated for Excessive Absenteeism

Isabelle Whalley worked as a receptionist for Newkirk & Whitney Funeral Homes. Whalley was terminated from her job for being tardy 16 times and applied for unemployment benefits. The funeral home opposed Whalley's application on the grounds that she engaged in willful misconduct by being tardy after sufficient warnings to improve. The Unemployment Commission granted Whalley unemployment benefits and the funeral home appealed.

The unemployment appeals referee found that Whalley, who had denied being late to work, was late approximately eight times in one month and received a written warning. The referee found that Whalley was late seven times in the next month. A short time later, she was late again and was terminated. The referee found that this pattern of tardiness constituted willful misconduct, making Whalley ineligible for unemployment benefits. The Employment Security Appeals Division Board of Review affirmed the decision and Whalley appealed to the Connecticut Superior Court.

In [Whalley v. Administrator](#) (10/31/03), the Connecticut Superior Court agreed that Whalley had engaged in a pattern of tardiness, even after receiving warnings from the funeral home, and that her conduct amounted to willful misconduct. The court upheld the decision denying her benefits.

Negligent, Unreasonable Conduct Not "Willful" FMLA Violation

Roy Hillstrom was General Manager of the Rooms Division of the Waltham, Massachusetts, Best Western. Hillstrom took a six-week FMLA leave of absence in 1999. When he returned, his title had been changed to Rooms Division Manager and another manager had taken over his office. His pay, benefits, and job responsibilities remained essentially the same. Tension developed between Hillstrom and the new manager and Hillstrom was placed on probation. Hillstrom complained and, within a few weeks, was fired. Hillstrom was replaced with a younger, female employee. Hillstrom sued alleging violations of gender and age discrimination and retaliation for exercising rights under the Family and Medical Leave Act. The trial court dismissed the lawsuit and Hillstrom appealed.

In [Hillstrom v. Best Western TLC Hotel](#) (12/31/03), the U.S. Court of Appeals for the First Circuit ruled for the first time that a willful violation of the FMLA does not include merely unreasonable and negligent conduct. Hillstrom argued that his FMLA claim was not time-barred because the hotel engaged in a willful violation of the FMLA, thus extending the Act's statute of limitations from two to three years. The First Circuit ruled that, "even assuming, without deciding, that there is sufficient evidence that Best Western decided to alter slightly Hillstrom's employment conditions because he took medical leave under the FMLA, there is no evidence that this constituted a 'willful' violation of the statute." The First Circuit also affirmed the dismissal of Hillstrom's gender and age claims because Best Western's job expectations were "quite reasonable on their face," and there was no evidence to suggest that Hillstrom was singled out and treated worse than other employees.

Request for "Work From Home" Accommodation Was Unreasonable under the ADA

Diane Mason, a former postal worker, was diagnosed with post-traumatic stress disorder after she witnessed a deadly incident of workplace violence. Thereafter, Mason worked at Avaya Communications as a service coordinator. Her post-traumatic stress disorder resurfaced after she learned that a co-worker had pulled out a knife and threatened to "go postal." Mason requested to work at home as an accommodation for her post-traumatic stress disorder. Avaya denied the request on the basis that her physical attendance was an essential function of her position, which required supervision and teamwork. Mason sued Avaya under the Americans with Disabilities Act.

In [Mason v. Avaya Communications Inc.](#) (1/13/04), the U.S. Court of Appeals for the Tenth Circuit upheld Avaya's decision to deny the accommodation. The Tenth Circuit found that working from home was not a reasonable accommodation when the employee's physical presence in the workplace was an essential function of the job.

Mold-Free Workplace May Be Reasonable Accommodation under the ADA

Dorothy Burnley worked for the City of San Antonio, Texas. She was diagnosed with rhinitis and sick building syndrome and was instructed by her doctor not to return to work until the mold and fungi were eliminated. The City temporarily relocated her from her building. Burnley underwent surgery after her doctor discovered that mold was growing in her nasal cavity. The City then hired a company to investigate and eliminated any mold or fungus problems. Afterward, the company reported that it had successfully removed mold in Burnley's building. Burnley objected to returning to her original workplace, because she contended the mold was not completely removed. Burnley sued claiming, among other things, that the City failed to accommodate her request for a mold-free workplace in violation of the Americans with Disabilities Act.

In [Burnley v. San Antonio](#) (1/6/04), the U.S. District Court for Texas allowed Burnley's ADA claim to continue to trial. The court rejected the City's argument that Burnley had not established her disability, finding sufficient evidence that Burnley's condition affected her ability to breathe and that she had sustained permanent damage to her lung functioning. The court also rejected the City's argument that Burnley's request for a mold-free workplace was unreasonable based on lack of evidence submitted by the City.

Cross-Dressing Doctor Not Protected By Anti-Discrimination Law

Gomer Pound was an emergency physician at Lee Memorial Hospital for approximately 13 years. His employment was terminated for failure to maintain an appropriate appearance and several instances of unprofessional behavior. Specifically, Pound wore nail polish, cosmetics, and "visible female undergarments" while on duty and was warned that his appearance violated hospital standards. Pound sued alleging that he was a victim of "gender stereotyping" and sex discrimination under the Michigan Civil Rights Act. The trial court dismissed his claim and Pound appealed.

In [Pound v. Lee Memorial Hospital](#) (12/11/03), the Michigan Court of Appeals rejected Pound's claim that the hospital violated the Michigan Civil Rights Act. The court found that different dress codes for men and women do not implicate an "inherent characteristic" of one's sex. Accordingly, the court found that Pound's conduct was not protected by the discrimination statute and his termination for violation of the gender-specific dress code policy was lawful.

Performance Improvement Plan and Discipline Are Not Actionable Defamation

Ann Marie Iosa worked as an account representative for Gentiva Health Services. Iosa complained to her supervisor, Josie McQuay, and later the Human Resources Department, about Gentiva's failure to properly reimburse her for work-related expenses. McQuay was offended that Iosa went over her head with the complaint. Around that time, Iosa also requested that McQuay provide her with a list of approval physicians because Iosa needed treatment for a work-related injury.

Later that month, McQuay placed Iosa on a performance improvement plan, which was critical of her performance and suggested that she falsified expense

reports, which Iosa denied. McQuay attempted to discipline Iosa in a public restaurant and Iosa left, telling McQuay that she was humiliated. Following the incident, Gentiva terminated Iosa. Iosa sued, alleging wrongful termination, retaliation for filing a workers' compensation claim, and retaliation for complaining that she had not been properly reimbursed for expenses. Iosa also alleged that Gentiva's performance improvement plan, the accusation of falsified expense reports, and the public discipline defamed her.

In [Iosa v. Gentiva Health Services, Inc.](#) (1/12/04), the U.S. District Court for Connecticut dismissed Iosa's claims of wrongful discharge. The court found that the right of an employee to complain to an employer about an improper expense reimbursement without fear of retaliation did not implicate a sufficiently important public policy to carve out an exception to the employment-at-will doctrine.

With regard to Iosa's defamation claim, the court determined that the performance improvement plan, which stated that McQuay had "serious concerns" about Iosa's performance and suggested that Iosa had falsified expense reports, was a "garden-variety performance memorandum from a supervisor to an employee with copies to other management personnel." Because the performance plan clearly constituted an expression of McQuay's opinion, it could not be defamatory. The court also rejected Iosa's claim that she was defamed when McQuay attempted to discipline her in a public place because Iosa failed to identify any specific defamatory statements made by McQuay, or allege that her reputation was damaged. The claim of worker's compensation retaliation was not addressed in Gentiva's motion to dismiss.

This is an archive of past issues. As a result, it may contain information that is not current.

The logo for Robinson & Cole LLP is displayed on a dark blue, curved banner. The text "ROBINSON & COLE" is in a large, white, serif font, and "LLP" is in a smaller, white, sans-serif font to the right.

ROBINSON & COLE^{LLP}