ROBINSON & COLE LLP
Labor, Employment & Benefits

First Circuit Upholds Dismissal of Religious Discrimination Claim by Follower of Church of Body Modification

In our April 19, 2004 issue we reported on the dismissal of a religious discrimination claim by Kimberly Cloutier, an adherent of the Church of Body Modification, against her employer, Costco. Cloutier was fired from her job as a cashier for refusing to remove facial jewelry as required by Costco's dress code policy. In Cloutier v. Costco Wholesale Corp. (12/1/04), the U.S. Court of Appeals for the First Circuit upheld the dismissal, but for a different reason. While the trial court had dismissed the case because Costco offered Cloutier a reasonable accommodation that Cloutier refused, the First Circuit ruled that Costco had no duty to accommodate Cloutier because any accommodation would have constituted an undue hardship for Costco. Specifically, since Cloutier claimed that CBM's tenets required her to be a "confident role model" by displaying her facial piercings at all times, the only accommodation she considered acceptable was an exemption from Costco's dress code policy. The appeals court ruled that such an accommodation would adversely affect Costco's public image, and therefore, would impose an undue hardship on Costco. The appeals court concluded that when the accommodation constitutes an undue hardship the employer has no obligation to provide such accommodation before taking an adverse employment action.

Four Months between Protected Activity and Discharge Is Too Long for Inference of Causality in Retaliation Claim

Arlene Gilbert was employed as a customer care representative for financing company AmeriFee L.L.C. In the fall of 2001 Gilbert complained to her supervisor that co-worker David Kramer referred to her as a "nazi." In response, Gilbert's workstation was relocated away from Kramer. Shortly thereafter, Gilbert reported to her supervisor that she was a "potential participant" in an age-discrimination claim brought by another co-worker. Four months later Gilbert received a phone call from a Spanish-speaking customer. She transferred the call to Victoria Hinojosa, a customer representative who was fluent in Spanish. Before Hinojosa could answer the call, Gilbert's line began to ring. As Gilbert answered the incoming call, she hung up on the Spanish-speaking caller. Hinojosa, fearing that management would believe it was she who disconnected the call, reported the incident to the Call Center Manager. After confirming that Gilbert had disconnected the customer, AmeriFee discharged her from employment. Gilbert then sued AmeriFee for age discrimination and for retaliation given her complaint about David Kramer and her involvement in the co-worker's lawsuit.

In Gilbert v. AmeriFee, L.L.C. (11/10/04), the trial court dismissed Gilbert's claims. The court found that Gilbert presented no evidence that AmeriFee was motivated by age discrimination, whereas the company demonstrated that it had discharged younger employees under similar circumstances. On the retaliation claim, the only evidence of causation Gilbert presented was that the discharge had occurred after the protected activity. The court rejected this claim, ruling that "four months was too long to sustain an inference of causality."

Documents Related to Disciplinary Action against Employee Are Personnel Records and Should Be Part of Personnel File

A month after being hired by the Cambridge Health Alliance, Michael N. Kessler was fired because of unsatisfactory information in his Criminal Offender Record Information report. Kessler requested a copy of his personnel file under the Massachusetts personnel records statute. Alliance sent Kessler a copy of the file, including copies of his application form, forms confirming date of hire and fire, wage withholding statement, confidentiality agreement and insurance forms. Not satisfied with the file produced to him, Kessler filed a lawsuit claiming that certain letters and other documents about him that were in possession of Alliance were missing from his copy of the personnel file.

In Kessler v. Cambridge Health Alliance (11/29/01), the Massachusetts Appeals Court held that the personnel records statue requires that a personnel record contain "any … documents regarding disciplinary action." While rejecting Kessler's claim for monetary damages or imposition of a civil fine, the Appeals Court remanded the case to the trial court to determine whether documents in Alliance's possession and not produced to Kessler were "documents related to disciplinary action" that should have been included in the personnel file. If so, Kessler would be entitled to a copy of such records, and, as provided by the statute, would then have the right to correct or comment on such records, and even to request their removal from his file.

Off-Duty Sale of Sexually-Explicit Videos Was Not a Matter of Public Concern

In our February 9, 2004 issue we reported on Roe v. City of San Diego, the case of a police officer who was discharged for refusing to refrain from selling sexually-explicit videotapes of himself on eBay. In addition to the videotapes, Roe sold police equipment, including uniforms, and listed "law enforcement" as his occupation on his eBay profile. The U.S. Court of Appeals for the Ninth Circuit had decided that Roe's conduct was "speech on a matter of public concern" and entitled to protection under the First Amendment. Last week, the U.S. Supreme Court rejected that argument.

In City of San Diego v. Roe (12/6/04), the U.S. Supreme Court ruled that while the First Amendment offers some protection to government employees who speak or write on matters of public concern or who speak or write on their own time on topics unrelated to their employment, that protection was not available to Roe. His conduct, although performed outside of the workplace, was linked to Roe's status as a police officer and was designed to exploit his employer's image. The conduct was not related to a subject of legitimate public concern in that it "did nothing" to inform the public of the operations of the San Diego Police Department. Because Roe's conduct brought the mission of the police department and the professionalism of its officers into serious disrepute, the decision to terminate his employment did not violate the First Amendment.

Heavy Lifting and Nighttime Driving Are Not Major Life Functions under the ADA

Deborah Bryant was a staff nurse in the Day Surgery Unit of Caritas Norwood Hospital. Her duties included lifting and adjusting patients, pushing and pulling stretchers, transporting patients' belongings, and bending to retrieve supplies. She was diagnosed with choroidal neovascularization – formation of blood vessels in the eye that are prone to breaking -- incidental to ocular histoplamosis. Bryant was instructed to refrain from heavy lifting, straining, and bending. She requested and was granted a 12-week leave of absence to undergo and recover from eye surgery (which took care of the hemorrhage, but not the underlying condition). Shortly before the leave expired, Bryant met with her supervisor to discuss her return to work in light of her medical limitations. Bryant was particularly concerned about the heavy lifting requirement and suggested a transfer to a scrub nurse position in another department. No decision on the transfer was made at that time. When Bryant reported for duty at the Day Surgery Unit following the end of her leave, she met with an employee-health representative who determined that, given the lifting restriction, Bryant could not safely work in the Day Surgery Unit. Bryant, however, was now unwilling to accept the transfer to the scrub nurse position and proposed instead that she be exempted from the heavy lifting requirement. The hospital refused this request on the grounds that heavy lifting was an "essential requirement" of the Day Surgery staff nurse position, and again offered the transfer. Bryant rejected the transfer (which offered the same pay and benefits as her prior position) and was placed on an extended leave. Twice during her leave the hospital offered Bryant the scrub nurse position, which she refused. Eight months later, when the extended leave expired, Caritas terminated Bryant's employment. Bryant sued for disability discrimination.

In Bryant v. Caritas Norwood Hospital (11/24/04), the U.S. District Court for Massachusetts dismissed the complaint. The court ruled that Bryant was not disabled under the ADA because her limitations -- heavy lifting and nighttime driving -- were not "major life activities" under the ADA. The court noted that "if a restriction in heavy lifting were … a substantial limitation on a major life activity ... the ranks of the disabled would … include infants, the elderly, the weak and the out-of-shape." The court also found that Bryant was not a "qualified individual with a disability" since to be "qualified" meant to be able to perform the essential functions of the job with or without a reasonable accommodation. Because Bryant could not perform the heavy lifting required for her position, she was not a qualified individual. The court also dismissed Bryant's claim that the hospital failed to provide a reasonable accommodation based on Bryant's own refusal to accept the scrub nurse position and to engage in the interactive process mandated by the ADA.

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

ROBINSON & COLE LLP