



ROBINSON & COLE LLP

## Labor, Employment & Benefits



### **Nondisclosure Agreement Does Not Constitute Noncompete or Nonsolicitation Agreement nor Prevent Former Employee from Competing with Former Employer**

Morgan Dewey resigned his job as a financial consultant for Merrill Lynch to join Morgan Stanley, taking his client list to his new employer. At Merrill Lynch, Dewey had executed a nondisclosure agreement but had not signed a noncompete or nonsolicitation agreement. Four days after Dewey's resignation, Merrill Lynch filed a lawsuit seeking an injunction ordering Dewey to return the client list and preventing him from contacting those clients for the benefit of his new employer. In [Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dewey](#) (6/30/04), the Massachusetts Superior Court granted a preliminary injunction and ordered Dewey to return Merrill Lynch's confidential client information database. However, the court declined to convert the nondisclosure agreement into a noncompete or nonsolicitation agreement, reasoning that Merrill Lynch could have obtained such protection by entering into that type of agreement with Dewey at the time of his employment.

### **Court Rejects ADA Disability Claim of Performer with Depression and PTSD**

Tess Rohan, a singer and actress, was hired by Networks Presentations LLC to play a character in a touring musical production. In the course of her employment, Rohan informed the production managers that she suffered from depression and post traumatic stress disorder. A few weeks into the production, Rohan began having "flashback episodes." As the December holidays approached, Rohan's episodes became more frequent. Networks' managers decided to release Rohan at the beginning of the holiday break. Her employment agreement provided for 30 days advance notice of any termination. When contacted to meet with Networks' executives, Rohan insisted on leaving immediately if Networks was going to release her at the December break. Rohan then filed a disability discrimination complaint against Networks under the Americans with Disabilities Act, alleging that her mental impairment substantially limited the major life activity of interacting with others. Rohan also alleged that Networks regarded her as unable to work in a touring theater company. In addition, Rohan sued for breach of contract, because Networks failed to give her the 30-day notice required under their employment contract. [Rohan v. Networks Presentations LLC](#) (7/8/04), the U.S. Court of Appeals for the Fourth Circuit rejected Rohan's claims. The court determined that Rohan was not substantially limited in working with others as she appeared to get along well with sufficient members of the touring company. The court also determined that Networks did not regard Rohan as unable to perform on stage. Her breach of contract claim failed because Rohan's insistence on leaving early preempted Networks' breach of the agreement.

### **Massachusetts Employer Loses Unemployment Appeal Due to Failure to Uniformly Apply Absenteeism Policy**

New England Wooden Ware Corporation discharged Joseph Callahan for failure to abide by the company's absenteeism policy. After his discharge, Callahan applied for and received unemployment benefits. NEWW challenged the decision to grant Callahan these benefits, arguing that he was discharged for "a knowing violation of a reasonable and uniformly enforced rule or policy of the employer" that rendered him ineligible for those benefits. According to NEWW's policy, unexcused absences or tardiness trigger progressive disciplinary measures: first and second infractions result in a written warning, while the third instance within a 12-month period results in discharge. In [New England Wooden Ware Corp. v. Commissioner of the Department of Employment and Training](#) (7/20/04), the Massachusetts Appeals Court agreed that Callahan was entitled to benefits. NEWW's absenteeism policy was not uniform because it provided that on a "case by case" basis the company would consider proven illness as outside the disciplinary procedure. The policy also provided that "senior employees with exemplary long term records of attendance and performance" would not be held to a strict interpretation of the policy. In addition, the policy was not uniformly enforced, as Callahan himself had not been disciplined for prior instances of partial attendance. Given NEWW's failure to uniformly apply its policy, the decision to grant the unemployment benefits to Callahan was upheld.

### **Manager's Refusal to Authorize Payment of Invoices that He Believed Showed FLSA Violations Was Not a Protected Activity**

Efrain Claudio-Gotay, an engineer at Becton Dickinson Caribe, Ltd., was responsible for monitoring the security guards at the plant and approving the invoices submitted by the guards' employer, CM Express Services Corp., for payment. When Claudio-Gotay realized that the invoices submitted by CM Express did not properly compensate the guards for overtime worked, he refused to sign the invoices and informed his supervisor about the potential Fair Labor Standards Act violation. In response to Claudio-Gotay's stated concerns, Becton met with its lawyer to determine how to proceed. Because Becton did not employ the guards, it determined that it was not responsible for ensuring that the guards received overtime pay, but decided to notify CM Express of the potential violations. After explaining this decision to Claudio-Gotay, Becton ordered Claudio-Gotay to authorize payment of the invoices. When Claudio-Gotay refused, his employment was terminated.

Claudio-Gotay filed a lawsuit against Becton claiming that it had violated the FLSA's prohibition against discriminating against an employee because the employee has filed a complaint related to the Act. In [Claudio-Gotay v. Becton Dickinson Caribe, Ltd.](#) (7/13/04), the U.S. Court of Appeals for the First Circuit ruled that Claudio-Gotay had not engaged in a protected activity. Explaining that an employee engages in a protected activity under the FLSA only when he or she steps outside of his or her "normal role" and files an action adverse to the employer, the court concluded that Claudio-Gotay was acting in his normal role and in furtherance of his job responsibilities when he first notified Becton of the potential violation. The court also ruled that Claudio-Gotay's second refusal to sign the invoices after learning how Becton planned to address the situation did not constitute lodging a complaint or supplying "information to officials regarding allegedly substandard employment practices and conditions," and thus, was not a protected activity under the FLSA.

### **At-Will Employment Relationship Does Not Bar an Employee from Suing his Employer for Fraud and Misrepresentation**

N. Arthur Astor, the owner of the KMXN and KFSD radio stations, offered Len Agosta the position of general sales manager for both stations. Agosta rejected Astor's initial offer because the proposed compensation was less than he was currently earning and because Astor wanted him to act as an account executive in addition to the general sales manager duties. Astor and Agosta negotiated over the compensation package and the proposed job responsibilities and finally reached an agreement. Astor then extended Agosta a formal job offer which Agosta accepted. Agosta resigned from his current employment and began working for Astor. Within a month after Agosta started working for Astor, however, Astor materially changed Agosta's job responsibilities and compensation package. Shortly thereafter, Astor fired Agosta but told him that he would be re-hired if he accepted substantially different and less-favorable terms. Agosta rejected this offer and filed a lawsuit against Astor for misrepresentation, fraudulent inducement and breach of the implied covenant of good faith and fair dealing. Astor defended his actions on the grounds that Agosta was an at-will employee, and thus, could be fired at any time.

Acknowledging that Agosta was an at-will employee, the California Court of Appeal ruled in [Agosta v. Astor](#) (7/12/04) that Agosta was entitled to present evidence on his fraud and misrepresentation claims at a trial. The court explained that an employer that induces an employee to enter into an employment contract by promising compensation terms that it never intended to honor cannot avoid liability for its conduct simply because the employee is at-will. In reaching this decision, the court stated that, although an at-will employee could not reasonably rely on a promise of long-term employment, he or she could justifiably rely on the employer's promises regarding the compensation terms.

### **Bankruptcy Filing Triggers Obligation to Pay \$5M to CEO**

Roger Fix was hired by Outboard Marine Corporation to turn the company around. At the time of his hire, Fix and OMC executed an employment agreement providing that in the event of a “change in control” he would receive as much as \$5 million. A change in control would occur if OMC’s board of directors approved the sale of all or substantially all of its assets. Shortly after Fix became OMC’s CEO, OMC filed for bankruptcy protection and the board of directors voted to sell all of the assets of OMC. After the sale, the board terminated Fix. Afterward, Fix filed a lawsuit claiming that the sale of assets triggered OMC’s obligation to pay him \$5 million. [Fix v. Quantum Industrial Partners LDC](#) (7/6/04), the U.S. Court of Appeals for the Seventh Circuit rejected OMC’s argument that a bankruptcy sale did not trigger a change in control. The court noted that the employment agreement’s definition of “change in control” was clear and unambiguous, that the definition did not exclude any bankruptcy filing, and that OMC had the opportunity to exclude the specific event that triggered its obligation but failed to do so. As a result, the court agreed that OMC breached the agreement and owed Fix \$5 million.

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The logo for Robinson & Cole LLP is displayed on a dark blue, curved banner. The text "ROBINSON & COLE" is in a white, serif font, with "LLP" in a smaller font size to the right. The banner has a slight shadow and a wavy edge on the right side.

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