ROBINSON & COLE LLP
Labor, Employment & Benefits

Union May be Liable for Hostile Environment and Retaliation

Robert Eliserio worked as a quality inspector for a Firestone plant in Iowa. In 1995, he resigned his membership in Local 310, a division of United Steel Workers, after crossing the picket line during a strike. Thereafter, a union member began referring to Eliserio as "Taco Bob." The member was fired by Firestone following Eliserio's complaint; however, Local 310 grieved the discharge and the employee was reinstated. Within a few months of the employee's return to the plant, graffiti depicting, among other things, rats labeled "Rateliserio" or "Ratserio", as well as the "Taco Bob" slur began to appear near Eliserio's work area. Eliserio complained and Firestone instructed the Local 310 divisional chairman to direct the employees to stop, but the graffiti continued. In addition, the Local 310 chairman purchased "No Rat" stickers and distributed them throughout the plant. The chairman claimed that they were meant as a general disincentive to employees who were making petty complaints to Firestone.

The union chairman allegedly told Firestone to "somehow get [Eliserio] out of the area" to reduce the amount of time the chairman had to spend investigating Eliserio's complaints. Shortly thereafter, Firestone disqualified Eliserio from his Quality Inspector job and transferred him to a lesser paying job, based on violations of the Company's internet policy and inappropriate use of a two-way radio. Evidence suggested, however, that other employees had not been disciplined for similar conduct. Eliserio requested that the union grieve his demotion, which it did and Firestone reinstated him to his Quality Inspector job. Eliserio, however, maintained that his authority and overtime opportunities were never fully restored and sued, among others, Local 310. The trial court concluded that Eliserio failed to present evidence that the union instigated or actively supported the discrimination or took adverse action toward him and granted Local 310 summary judgment.

In Eliserio v. Local 310 (2/24/05), the U.S. Court of Appeals for the Eighth Circuit reversed the trial court and reinstated Eliserio's claims against Local 310. The Eighth Circuit concluded that, while a union has no affirmative duty to investigate and take steps to remedy employer discrimination, it may be liable if the union itself instigated or actively supported the discriminatory acts. "A reasonable jury could find that the union-issued 'No Rat' stickers were intended to be associated with the 'Ratserio' drawings in the graffiti and, thus, would serve as a broad endorsement of the graffiti, including the discriminatory elements." With respect to the retaliation claim, the court found that a jury could reasonably conclude that the union chairman's request that Firestone act to remove Eliserio to a different area of the plant was an adverse action and demonstrated retaliatory motive. The court discounted the fact that the union grieved Eliserio's demotion, as it was contractually obligated to do so.

American Airlines' Medical Tests Premature

Walber Leonel, Richard Branton and Vincent Fusco applied separately for flight attendant positions with American Airlines. As part of the standard application process, they traveled to American's corporate headquarters in Dallas for interviews. Following the completion of the interviews, American gave each a written conditional offer of employment, conditioned on the successful completion of a medical exam, drug test and background check.

The medical exam was conducted first. In filling out the medical exam paperwork, none of the three applicants disclosed his HIV status, despite applicable questions. A nurse collected a urine specimen for drug tests, and a blood test which, upon inquiry by Fusco, was explained as a test for anemia. American did not provide notice nor obtain consent for its blood test or indicate that a complete blood count (CBC) would be run. A CBC was done and the results revealed that all three applicants were HIV positive. American sent each a letter rescinding its conditional offer, based on the applicants' failure to provide full and correct information during the exam. The applicants sued for violations of, among other laws, California's Fair Housing and Employment Act (FEHA), which is governed by ADA requirements. The trial court dismissed the claims and the applicants appealed.

In Leonel v. American Airlines, Inc. (3/4/05), the U.S. Court of Appeals for the Ninth Circuit reversed the trial court and reinstated the claims. The Ninth Circuit took issue with the sequence in which American conducted its medical examinations in the application process. The court noted that the ADA and FEHA prohibit "medical examinations and inquiries until after the employer has made a 'real' job offer to an applicant." The court concluded that a job offer is not "real" until the employer has reviewed all relevant non-medical information that could reasonably be obtained. Therefore, before extending a conditional job offer and conducting a medical exam, American should have first completed such non-medical contingencies as the background check.

The Ninth Circuit rejected American's arguments that it performed the medical exams prior to the background checks because the applicants were available and had traveled all the way to Dallas, and because of tight competition for flight attendants. Further, the court rejected American's argument that no violation occurred because the background checks were actually completed before the medical exams were received. The court concluded "the statutes regulate the sequence in which the employers collect information not the order in which they evaluated." The court suggested that American should have issued two rounds of conditional offers to enable applicants whose offers were later revoked to discern the reasons and maintain the privacy of their medical information. The court also revived the applicants' claims that the testing of their blood without proper consent or explanation violated their State constitutional right of privacy.

Injuries Suffered During Commute Not Employer's Fault

Tracy Hernandez worked as a surgical nurse for Tallahassee Medical Center, working both regularly scheduled days and "on call" at the hospital. Hernandez suffered from epilepsy and her neurologist recommended that she not drive to work. The hospital reimbursed Hernandez for taxi fare to and from work if called in while "on call" in an effort to accommodate her medical condition; however, it did not reimburse her on regularly scheduled days. Hernandez had been counseled by the hospital regarding her attendance and punctuality.

In July 2002, Hernandez called in sick, reporting that she had a headache and other symptoms of an impending seizure. Her supervisor, however, instructed her to get to work "right away." Hernandez drove to work, suffered a seizure, and was in an accident sustaining "serious and permanent" injuries. Hernandez sued the hospital, alleging it was liable for her injuries because it should have foreseen that if she complied with her supervisor's order "she would more than likely be forced to drive herself and suffer a seizure and the consequential accidental injuries."

In Hernandez v. Tallahassee Medical Center, Inc. (2/23/05), the Florida District Court of Appeal affirmed the trial court's dismissal. Although the court noted that under some circumstances the special relationship of employer to employee could result in an employer's liability, it found that the hospital did not control the risk to which Hernandez was exposed, nor did it control Hernandez' actions. "The hospital's demand was not accompanied by an explicit threat that if she failed to comply she would be subject to termination, nor did it include an express order that she drive herself immediately to work," the court concluded. The court found that Hernandez retained the choice to decline the directive and suffer any potential consequences or to seek a different means of transportation than driving herself.

DOL Announces New USERRA Notice of Rights and Benefits

The Veterans Benefits Improvement Act, enacted in December of 2004, mandates that employers provide notice to "all persons entitled to rights and benefits under USERRA." Employers may meet this obligation by posting the notice in a prominent place where employees customarily find such information.

The U.S. Department of Labor announced that a notice in poster format explaining the rights of employees under the Uniformed Services Employment and Reemployment Rights Act ("USERRA") is available for employers to download from the DOL website atwww.dol.gov/vets/programs/USERRA/poster.pdf.

Vulgarity, Pornography, and Indecent Propositions Cross "Indistinct Line" for Sexual Harassment Case

Ann Dunbar worked as a corrections officer at a Saratoga County, New York, correctional facility. During her employment, Dunbar alleges that her coworkers and supervisors regularly used obscene language, viewed pornography, and, on several occasions, her coworkers made sexual advances toward her. Dunbar never complained or asked to be reassigned. However, Dunbar stated to a sheriff that she intended to apply for a civil service position because of the working environment at the correctional facility. Dunbar also informed two officers that she had been subjected to sexual harassment during an investigation of another employee's unrelated sexual harassment complaint, but did not name her alleged harassers. Dunbar sued for sex discrimination under Title VII of the Civil Rights Act of 1964 and the New York Human Relations Law. The County moved for summary judgment based on the nature of the allegations and the fact that Dunbar did not complain.

In Dunbar v. County of Saratoga (3/3/05), the U.S. District Court for New York concluded that Dunbar presented sufficient evidence of harassment by coworkers to proceed to trial, even though she never formally complained. The court found that the allegations of harassment were more than single, isolated examples of verbal abuse, and were alleged to have occurred on at least multiple, if not regular, occasions. While the case presented "a close issue," the court found that a jury could reasonably conclude that the coworkers' conduct "crossed the admittedly indistinct line between boorish and inappropriate behavior and actionable sexual harassment." Although the court did not find Dunbar's discussion with the sheriff sufficiently detailed, Dunbar's discussions with the two officers constituted sufficient notice to the employer, even though Dunbar never formally complained and never named her alleged harassers.