ROBINSON & COLE LLP
Labor, Employment & Benefits

The ADEA's Protections Extend to Employment Practices that Have a Disparate Impact on Workers Over 40

In an effort to bring its starting salaries in line with neighboring communities, Jackson, Mississippi increased the salaries of its police officers and dispatchers. Officers with less than five years of seniority, most of whom were under 40, received proportionally higher increases than officers with more than five years of service. A group of over-40 officers sued the city, claiming that the pay raises violated the Age Discrimination in Employment Act because the raises were less generous to officers over 40 than to younger officers. Initially, this claim was dismissed on the basis that the ADEA prohibits only conduct that is deliberately motivated by an intent to discriminate. The police officers argued that the ADEA also prohibits conduct which has a disparate impact on over-40 workers.

In Smith v. City of Jackson (3/30/05), the United States Supreme Court clarified the scope of the ADEA. The Supreme Court ruled that the ADEA prohibits acts which have the effect of discriminating against over-40 workers, even if there is no discriminatory intent, unless the differential treatment is based on reasonable factors other than age. To avoid liability under the ADEA, the employer must establish that it had a reasonable basis for its conduct. The employer is not required to show that the desired results could be accomplished only if it used a method which resulted in a disparate impact on over-40 workers. Looking specifically at the pay raises, the Supreme Court ruled that the salary increases did not violate the ADEA because they were based on on reasonable factors other than age, namely, seniority, position and the desire to bring Jackson's salaries in line with those of surrounding cities.

Male Subordinates Can Pursue Hostile Work Environment Claim against Female Supervisor, but Male Superior Officer Failed to Establish that Harassment Was Severe and Pervasive

Sergeant Christopher Wells and Officer Philip Kujawski were civilian police officers employed by the U.S. Navy at the Groton, Connecticut Submarine Base. Wells and Kujawski were both subordinate to Lieutenant Pamela Coleman, who, in turn, was junior to Captain Peter Anderson. Coleman frequently swore and made lewd and vulgar statements at work. Specifically, Coleman frequently questioned Kujawski about his sexual relations with his wife and targeted Wells by calling him fat, stupid and lazy, and by continually making comments to him such as "all men are liars and cheats" and "you are a liar and a cheat." Wells, Kujawski and Anderson filed a lawsuit against the Secretary of the Navy, claiming that Coleman's conduct created a hostile working environment. Based on evidence that at least some of Coleman's conduct toward Wells and Kujawski was based on their gender, the U.S. District Court in Connecticut ruled in Anderson v. England (3/9/05) that Wells and Kujawski were entitled to try to prove their hostile work environment claims to a jury.

Captain Anderson, on the other hand, was not subordinate to Coleman and could, and often did, walk away or tell Coleman to stop speaking to him, without any negative repercussions. Moreover, Anderson was not directly subjected to any gender-based harassment by Coleman, but, instead was aware of her gender-based comments only through the complaints of others. Accordingly, the court decided that Coleman's alleged harassment of Anderson was not sufficiently severe and pervasive to create an objectively hostile work environment under Title VII and dismissed Anderson's claims.

Transsexual Police Officer Entitled to Pursue Discrimination Claim Based on Failure to Conform to Sexual Stereotypes

Philecia (formerly Phillip) Barnes filed a lawsuit against the City of Cincinnati after he failed the probationary period required to become a police sergeant in the Cincinnati Police Department. Barnes claimed he was subjected to an unfairly rigorous training program during the probationary period because he failed to conform to sex stereotypes. At the time, Barnes was living as a pre-operative male to female transsexual when he was off duty but presented as a male while on duty. Although Barnes scored well on the written exam, his supervisors felt he lacked a command presence and did not have the respect of his subordinates. At least one supervisor told Barnes that he did not appear to be masculine and that he needed to stop wearing makeup and act more masculine. The police department responded to the lawsuit by arguing that Barnes was not a member of a protected class since Title VII does not apply to transsexuals. In Barnes v. City of Cincinnati (3/22/05), the U.S. Court of Appeals for the Sixth Circuit ruled that Barnes had the right to present his claims to a jury since stereotyping based on the perception that a person's behavior does not conform with his gender is impermissible discrimination on the basis of sex. Because Barnes did not claim he had been discriminated against because he was a transsexual, but rather, claimed that he had been discriminated against because he failed to conform with stereotypes regarding how a man should look and behave, he had articulated a legitimate claim under Title VII.

Employee's Inappropriate Comments about Supervisor Were Not Constitutionally Protected

State Trooper Bonnie Tuskowski was disciplined after she was overheard making an inappropriate comment about her supervisor to her union representative. When questioned about the incident by William Griffin, a member of the Internal Affairs Department, Tuskowski claimed that her conversation with her union representative was privileged. Following an investigation, Tuskowski was suspended for one day. Tuskowski then sued Griffin and her commanding officer, claiming that the discipline violated her rights to equal protection and freedom of association. In Tuskowski v. Griffin (3/14/05), the U.S. District Court for Connecticut ruled that an employee does not have the right to insult her supervisor under the pretext of the freedom to associate, even if the comment was made to a union representative. The court also rejected Tuskowski's equal protection claim because she failed to show that she was treated differently from other similarly situated individuals.

Imposition of Harsher Discipline on White Employee Is Not Evidence of Race Discrimination

Cynthia Lucibello, who is white, and Brenda Baker-Chapman, who is African-American, both work at Yale-New Haven Hospital. Following a verbal altercation between the two (which was allegedly provoked by Baker-Chapman), Lucibello was given a final written warning and a three-day suspension, but Baker-Chapman was given only a written warning. Lucibello sued the hospital for race discrimination, claiming she received harsher discipline because of her race. In Lucibello v. Yale-New Haven Hospital (3/10/05), the U.S. District Court for Connecticut ruled that the hospital had a legitimate, non-discriminatory reason for imposing harsher discipline on Lucibello; specifically, that Lucibello had been disciplined before for similar conduct, whereas Baker-Chapman had no such history of disruptive conduct. The court also concluded that Lucibello had failed to offer any evidence demonstrating that the hospital's explanation for its actions was a pretext for race discrimination.

Eligibility for FMLA Protection is Determined on Date Leave Commences

Kellie Jo Willemssen began working as a receptionist/administrative assistant for The Convoyer Company on August 29, 2000. From her date of hire until June 1, 2001, Convoyer allowed Willemssen to take 24 days of leave. Then, beginning on June 1, 2001, Convoyer allowed Willemssen to take an unpaid leave of absence in order to participate in activities with her children. While on leave, Willemssen was hospitalized due to pregnancy complications and delivered her baby prematurely on July 6, 2001. On August 31, 2001, thirteen weeks after Willemssen's leave of absence began, Convoyer terminated her employment on the grounds that she had failed to notify Convoyer when, if ever, she would be returning to work.

Willemssen then sued Convoyer for violation of the Family and Medical Leave Act. In response to Convoyer's defense that it had allowed Willemssen to take almost 18 weeks of leave during her first year of employment, Willemssen argued that any time off taken before she qualified for FMLA leave could not be

counted as FMLA leave, and that, starting on August 29, 2001 (her one year employment anniversary), she was entitled to take an additional 12 weeks of leave pursuant to the FMLA. In Willemssen v. The Convoyer Co. (3/18/05), the U.S. District Court for Iowa rejected Willemssen's attempt to expand the rights protected by the FMLA. Because Willemssen was not eligible for FMLA protections on the date her leave commenced, none of her leave was covered by the FMLA. Therefore, Convoyer did not violate the FMLA when it terminated Willemssen's employment.

Requiring Employee to Choose Between Job and Health of Unborn Child Violated Connecticut's Prohibitions on Pregnancy Discrimination

The Crestfield Rehabilitation Center is divided into several wings, of which, wing one imposed the heaviest physical burdens on the staff due to the needs of the patients. When Staci Davis, a pregnant nursing assistant, reported to work one afternoon, she was told she had been assigned to wing one because another co-worker had called in sick. Davis asked to be reassigned to one of the other wings because she had experienced cramps while working the previous day and was concerned that the heavy physical activity required when working on wing one would harm her health and the health of her unborn child. The supervisor refused to reassign Davis, even though another co-worker volunteered to switch with Davis. The supervisor told Davis to "deal with it" or leave and never come back. Davis chose to go home. The next day Davis met with the director of nursing to discuss the incident and was told that an investigation would be conducted. Instead, later that day, Davis was informed that her employment was terminated.

Davis sued her employer, claiming she was terminated because of her pregnancy in violation of the Connecticut Fair Employment Practices Act. In Davis v. Manchester Health Center, Inc. (3/15/05), the Connecticut Court of Appeals upheld a jury verdict in favor of Davis. The court concluded that the jury reasonably determined that Convoyer terminated Davis' employment because she chose to leave her shift rather than remain in an assignment she reasonably believed posed a risk to her health and the health of her unborn child, and that such conduct violated the state law prohibiting discrimination on the basis of pregnancy. The court also ruled that the Health Center unreasonably required Davis to chose between her job and the safety of her unborn child, thereby negligently inflicting emotional distress on Davis in the process of terminating her employment.