ROBINSON & COLE LLP
Labor, Employment & Benefits

Reducing Employee's Responsibilities and Status upon Return from Military Leave Violates USERRA

Joseph Duarte was employed by Agilent Technologies as a design consultant. Duarte was a member of the Marine Corp Reserves and was called up for duty. Upon his return nine months later, Duarte was reinstated as a design consultant with the same pay and benefits as before his leave. Prior to his leave, he was the primary design consultant for his business group. After his return, Duarte was assigned to assist other design consultants and to work on a special survey project. Subsequently, as part of a cost reduction program, Duarte's supervisor evaluated the design consultants to determine which personnel to retain. Duarte received low scores, and his supervisor recommended that he be terminated as part of the cost reduction program. Agilent terminated Duarte's employment four months later.

Duarte sued Agilent, claiming that his termination violated the Uniformed Services Employment and Reemployment Rights Act. In Duarte v. Agilent Technologies, Inc. (3/31/05), the U.S. District Court for Colorado found that Agilent's failure to reinstate Duarte to a position of like status upon his return from leave violated USERRA. The court explained that Duarte's assignment to the special project diminished his responsibilities and status. The diminished status disadvantaged Duarte because his diminished status was significant to the evaluation process that led to his termination. The court also ruled that terminating Duarte within one year of his reemployment without cause also violated USERRA. The court found that Agilent's cost reduction program was not cause for Duarte's termination because it did not result in fewer personnel, as Duarte was replaced by another employee.

Teacher Who Spoke Out about Student Issues May Proceed with Retaliation Claims

The Rocky Hill, Connecticut school system offered a program designed to improve student behavior and cooperativeness. Linda Sturm, a middle school teacher, made recommendations concerning the program, including whether certain students should be placed in the program. The Rocky Hill Board of Education notified Sturm that her contract would not be renewed. Sturm filed a lawsuit against the Board of Education, claiming that she was retaliated against for speaking out about student issues, in violation of Connecticut law, the federal Rehabilitation Act, and section 1983 for exercising her freedom of speech under the First Amendment.

In Sturm v. Rocky Hill Board of Education (3/29/05), the U.S. District Court for Connecticut rejected the Board of Education's request that the court dismiss Sturm's claims. The court determined that Sturm's communications with school officials about specific students could serve to advance the federally legislated goal of integration of disabled students into regular classrooms, and thus be a matter of public concern for the purposes of establishing her section 1983 and First Amendment claims. The court also observed that the Rehabilitation Act protected persons who advocate on behalf of the disabled from retaliation. Thus, the court ruled that Sturm also could proceed on her claims that she was retaliated against for her efforts on behalf of disabled students.

Employee's Allegations of Eight Incidents of Harassment Fail to State Religion or National Origin Hostile Work Environment Claim

Steve Bourini, a Muslim and an immigrant from Jordan, worked as a tire builder for Bridgestone/Firestone North America Tire. Bourini claimed that he experienced eight incidents of harassment over five years of employment, including a co-worker claiming that he would "send him back to his country," a statement about getting the "sand out of his ears," graffiti and derogatory statements about Islam, an employee imitating his voice over the loudspeaker, and an incident where a co-worker allegedly tried to back over him with a forklift truck. Although Bourini complained about most of these incidents and the company took action, Bourini filed a lawsuit against Bridgestone/Firestone, claiming that he suffered a hostile work environment based on his religion and national origin in violation of Title VII of the Civil Rights Act of 1964 and Tennessee law. The lower court dismissed Bourini's claims and Bourini appealed.

In Bourini v. Bridgestone/Firestone North America (3/30/05), the U.S. Court of Appeals for the Sixth Circuit upheld the lower court's decision, ruling that the eight incidents were not severe or pervasive enough to establish a hostile work environment claim. The eight alleged incidents over a period of five years were too infrequent and isolated to be "pervasive." Moreover, while the incidents were inappropriate, they did not rise to the threatening and humiliating level of severe conduct required to be actionable. Finally, the appeals court noted that, even if Bourini established a hostile work environment, there was no evidence the company failed to respond appropriately to his complaints; thus, the company would not be liable for creating a hostile work environment.

Employee's Unauthorized Access of Co-Workers' Confidential Information Is Legitimate, Non-Discriminatory Reason for Dismissal

Cheryl Albury was employed as a customer service officer for J.P. Morgan Chase. The company's written policies prohibited accessing confidential employee information for non-work related purposes. Albury had access to certain employee account information for work purposes. After co-workers complained that Albury was accessing and disseminating their salary and other confidential information, the company conducted an investigation. In the investigation, Albury submitted a signed statement admitting that she accessed some salary information because she was curious and because co-workers requested that she view it. Albury was terminated for violating the company's confidentiality policy. She sued J.P. Morgan, alleging race, color, national origin, gender, and age discrimination.

In Albury v. J.P. Morgan Chase (3/31/05), the U.S. District Court for New York dismissed Albury's claims. Although Albury argued that other employees committed more egregious acts, such as sexual harassment, the court ruled that she was not similarly situated to those employees because the circumstances surrounding her termination were not comparable to those of the other employees. Albury's admission that she accessed confidential information out of curiosity, in violation of the company's policies, was a legitimate non-discriminatory reason for her termination.

Failing to Hire Mechanic for Being "Too Union" Violates NLRA

Gary Singer, a mechanic and a member of the International Union of Operating Engineers, Local 132, AFL-CIO, was called upon by Mashuda Corporation to work on highway construction projects. While working on one project, Singer clashed with a supervisor who attempted to lay him off in favor of a non-union worker. Mashuda also had a conflict with another supervisor over whether union operators, and not laborers, should be operating certain equipment. When Mashuda and the union discussed staffing needs for a highway widening project, Mashuda advised the union that it did not want Singer on the project due to conflicts with supervisors. According to Singer, a Mashuda representative remarked that Singer was "too union" for the company. Singer filed a complaint with the National Labor Relations Board, arguing that he was discriminated against on the basis of his membership in the union. The NLRB ruled in favor of Singer.

Mashuda appealed to the U.S. Court of Appeals for the Fourth Circuit, seeking review of the NLRB's ruling. In Mashuda Corp. v. National Labor Relations Board (4/20/05), the appeals court upheld the NLRB's decision. The appeals court found sufficient evidence, including the statement that Singer was "too union," for the NLRB to conclude that Mashuda was motivated, at least in part, by anti-union animus in refusing to hire Singer.

Employee with Tourette's Syndrome Not Substantially Limited in Interacting with Others

Jeffrey Bell was a photographer for the Federal Bureau of Investigation. Bell's neurologist sent a letter to his managers about the side effects of Bell's medication to control his Tourette's Syndrome. According to Bell, a short time later he was denied travel assignments and excluded from managerial meetings. Bell had repeated conflicts with his supervisor. Bell met with an EEO counselor to discuss these difficulties, but did not file a complaint. A few months later, Bell was transferred to another unit. He sued the FBI, alleging that he was discriminated against based on his disability and retaliated against for consulting with the EEO counselor, in violation of the Rehabilitation Act. The FBI sought dismissal of the claims, arguing that Bell could not establish that he was disabled under the Rehabilitation Act because he was not substantially limited in a major life activity. Bell countered that he was substantially limited in the major life activity of interacting with others.

In Bell v. Gonzales (3/25/05), the U.S. District Court for the District of Columbia found that interacting with others is a major life activity within the meaning of the Rehabilitation Act. The court reasoned that the ability to interact with others is as basic and significant as the ability to learn or to work, which are recognized as major life activities. However, Bell did not demonstrate that Tourette's Syndrome substantially limited him in his ability to interact with others. Although Bell alleged instances in which people avoided or ridiculed him and that co-workers misinterpreted his words and gestures, the court found that these problems were subjective and not encompassed in the definition of interacting with others. As Bell enjoyed the basic ability to communicate and interact with others in an objective mechanical sense, he was not substantially limited. However, the court allowed Bell to proceed on his claim that he was retaliated against for speaking to the EEO counselor.

New Connecticut Law Restricts Overtime for Nurses and Certified Nurse's Aides Working in Hospitals, Effective October 1, 2005

Connecticut enacted a law, codified at 19a-490l, that places mandatory limits on overtime for nurses working in hospitals. The statute's definition of "nurse" includes not only registered nurses and licensed practical nurses but also certified nurse's aides. The law provides that, effective October 1, 2005, hospitals may not require a nurse to work in excess of a scheduled work shift if that shift was determined and promulgated forty-eight hours or more before the start of the shift. Hospitals are expressly prohibited from discriminating against, discharging, dismissing, or taking any other adverse employment action against any nurse on the grounds that he or she has refused to accept such additional hours. The statute does not restrict any nurse from volunteering or agreeing to work hours in addition to his or her scheduled work shift, but the nurse cannot be required to work those hours.

The statute contains a number of exceptions to the general prohibition against required overtime. The overtime restrictions do not apply: (1) to a nurse participating in a surgical procedure until the procedure is completed; (2) to a nurse working in a critical care unit until the nurse is relieved by another nurse beginning a scheduled work shift; (3) in the case of a public health emergency; (4) in the case of an institutional emergency, including but not limited to adverse weather conditions, catastrophe or widespread illness, that in the opinion of the hospital administrator will significantly reduce the number of nurses available for a scheduled work shift, provided the hospital administrator has made a good faith effort to mitigate the impact of such institutional emergency on the availability of nurses; or (5) to any nurse who is covered by a collective bargaining agreement that contains provisions addressing the issue of mandatory overtime.

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