ROBINSON & COLE LLP

Labor, Employment & Benefits

Employee May Proceed with Retaliation Claim after Underlying Sexual Harassment Claim Is Dismissed

Debbie Barlow worked in the scanning department for ConAgra Foods. She complained that a female co-worker touched her in a sexually inappropriate manner by hugging her, rubbing her shoulders and brushing against her breast, and made sexually inappropriate comments. Barlow complained to ConAgra's human resources manager but claims that the manager threatened to fire Barlow as well as the female co-worker if the two "did not work it out." Barlow filed a discrimination charge with the Equal Employment Opportunity Commission after which the parties unsuccessfully tried to resolve the case through mediation. Soon after, Barlow was suspended for talking about the confidential mediation sessions as well as for using language that threatened violence against the company. Barlow then filed a retaliation claim against the company, alleging that she was suspended in retaliation for filing a sexual harassment claim. ConAgra filed a motion asking that Barlow's claims be dismissed.

In Barlow v. ConAgra Foods, Inc. (11/23/05), the U.S. District Court for Florida refused to dismiss Barlow's retaliation claim even after finding that her sexual harassment claim against the company could not proceed. Although Barlow's allegations of sexual misconduct did not rise to the level of unlawful harassment, a question of fact remained as to whether Barlow was suspended for filing a sexual harassment claim or, as the company claimed, suspended for violating the confidentiality agreement of the mediation and threatening violence in the workplace. Thus, Barlow was entitled to pursue her retaliation claim at trial.

Employer's Lack of Participation in Process Renders Arbitration Agreement Unenforceable

Stephanie Brown began working for Dillard's Store Services. A few months later, Brown's supervisor informed her, along with several co-workers, that the company was beginning the "Dillard's Fairness in Action Program," which required employees to arbitrate disputes. Employees were required to sign forms acknowledging their receipt of the rules for arbitration. Employees who questioned the program were told that their jobs would be in jeopardy if they did not sign the acknowledgement form immediately. Brown signed the acknowledgement form. She was subsequently fired for allegedly falsifying her timesheet.

Brown filed a notice of intent to arbitrate in accordance with the Fairness in Action Program. Dillard's, however, did not respond to the arbitrator's request for information and did not pay its share of the arbitration fee. As a result, the arbitrator returned Brown's notice of intent to arbitrate. Brown then filed suit in Los Angeles County Superior Court. Dillard's transferred the case to federal court and asked the court to compel arbitration. The court denied the motion, ruling that the arbitration agreement was unconscionable and unenforceable under California law.

In Brown v. Dillard's Inc. (12/6/05), the U.S. Court of Appeals for the Ninth Circuit did not opine on whether the agreement was unconscionable but denied Dillard's motion to compel arbitration nonetheless, concluding that an employer that enters into an agreement requiring employees to arbitrate must participate in the arbitration process itself or lose its right to compel arbitration.

Questions about Age Differences in an Interview Give Rise to a Claim of Age Discrimination

William Plegue, a 48-year old radio producer, applied for a position as producer of a sports-talk morning show with Clear Channel Broadcasting. Plegue had worked in the radio industry for nearly 20 years, 18 as a producer of radio shows in the Detroit market. During his interview, the program director asked Plegue whether he would have a problem working with the 31- and 32-year old hosts and whether their age difference would be a problem. Plegue did not get the position. Instead, Clear Channel hired a 24-year old who had done an internship with the broadcasting company the previous year and then stayed on as a part-time producer.

In Plegue v. Clear Channel Broadcasting, Inc. (11/22/05), the U.S. District Court for Michigan ruled that Plegue could proceed to trial with his age discrimination claims against Clear Channel. The court determined that Plegue had presented evidence that he was rejected in favor of a younger, less-qualified applicant, and that he had significantly more experience than the applicant who was hired. This contradicted Clear Channel's claim that the applicant had more producing experience than Plegue. In order to prevail on his age discrimination claim, Plegue needed to establish only that age was one of the reasons for the decision not to hire him. Plegue did not need to establish that his age was the exclusive reason for Clear Channel's decision.

Nonexempt Employees who Volunteer for their Employer May Receive Nominal Payments

On November 10, 2005, the U.S. Department of Labor issued an opinion letter stating that nonexempt employees who engage in volunteer work for their employer may receive nominal payments without jeopardizing their nonexempt status. The opinion letter specifically addressed the question of whether the stipends paid to non-teaching, nonexempt school employees who volunteer as coaches or advisors for school teams and clubs were permissible. The Department of Labor stated that the stipends were permissible since they were not intended or provided as a substitute for wages. Further, the stipends did not vary based on the amount of time the volunteer spent engaged in the activity or upon the success or failure of a team or activity. The Department also specifically noted that the employees chose to volunteer without pressure or coercion from the employer and that the employer did not separately reimburse the volunteers for their out-of-pocket expenses.

Non-Discretionary Bonuses Must be Included when Calculating Overtime Pay

On November 4, 2005, the U.S. Department of Labor issued an opinion letter clarifying the proper computation of overtime pay under the Fair Labor Standards Act when non-exempt employees are promised a bonus. A non-discretionary bonus which is announced to employees and regarded as part of their regular pay must be included as part of their regular rate of pay when calculating overtime. Further, the bonus amount must be apportioned back over each work period that it covers, which may require adjustment of the regular rate of pay and any payment of additional overtime for previous weeks.

Reminder that Connecticut's Minimum Wage Increases to $7.40

On January 1, 2006, Connecticut's minimum wage increases from $7.10 to $7.40. Although the federal minimum wage remains at $5.15 per hour, the Connecticut Department of Labor reminds employers in an announcement that the higher rate must be paid to all covered employees.

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