ROBINSON & COLE LLP
Labor, Employment & Benefits

Engineer's Request to Work from Remote Location Not a Reasonable Accommodation under ADA

Michael Mulloy was employed by Acushnet Company as an electrical engineer. Mulloy's duties included evaluating and troubleshooting machines in a plant where the company manufactured golf balls and other golf equipment. Mulloy began experiencing dizziness and other symptoms he attributed to exposure to chemical irritants in the plant. When these symptoms persisted, Acushnet's occupational medical consultant recommended that Mulloy stay out of buildings where the irritants were used. Mulloy was transferred to an office location several miles away from the plant. However, Acushnet later determined that Mulloy could not perform his job functions from a remote location and subsequently terminated his employment. Mulloy sued Acushnet under the Americans with Disabilities Act and the Massachusetts disability law, claiming that he was disabled and that, as a reasonable accommodation, Acushnet should have allowed him to continue to perform his job responsibilities from a remote location.

In Mulloy v. Acushnet Company (6/20/05), the U.S. District Court for Massachusetts dismissed Mulloy's claims. Mulloy failed to demonstrate that he was able to adequately perform the essential functions of his job, with or without a reasonable accommodation. Mulloy did not refute evidence presented by Acushnet that to adequately perform his job duties he must be able to see and have access to the plant machines and those operating them to assess their functioning, and must be present in the plant to train and support personnel. Mulloy's proposed job accommodations, including the use of a web camera to allow him to see the machines from a remote location, were not reasonable. Although such accommodations would allow Mulloy to perform some aspects of his job functions, they would not allow him to perform those essential job functions that required his physical presence at the plant. Moreover, Acushnet was not obligated to transfer essential functions to other employees, making their jobs more onerous.

Police Officer Denied Promotion in Favor of Officer Six Years Younger May Proceed to Trial on ADEA Claim

Dann McInnis, then 42 years old, a police officer for the Town of Weston, applied for a promotion to sergeant. The promotion process consisted of a written examination and an oral examination, with seniority also considered. Although McInnis received a superior score on the written examination, Patrick Daubert, age 36, received the highest overall score and was promoted. McInnis alleged that the chief of police manipulated the results of the examination in favor of Daubert. According to McInnis, the chief made a number of age-based comments, including that the department should "get rid of the old guys and hire young ones." McInnis sued the town and the police chief under the Age Discrimination in Employment Act and the Connecticut Fair Employment Practices Act, claiming that the chief manipulated the promotional process to favor Daubert, discriminated against him based on his age in the promotion decision, and retaliated against him for his complaints of discrimination.

In McInnis v. Town of Weston (6/28/05), the U.S. District Court for Connecticut found that McInnis presented enough evidence to proceed on his ADEA and CFEPA claims. The court rejected the town's argument that McInnis could not prove discrimination because there was an insignificant age difference between McInnis and Daubert, who was promoted. The court noted that in previous decisions, courts have found age differences of more than ten years to be significant and less than five years to be insignificant. In this case, in light of the circumstances including the evidence of age-biased comments, the six-year difference between McInnis and Daubert could support an age discrimination claim. Moreover, McInnis presented evidence that the town's reason for the promotion decision, Daubert's test score, was pretextual, including evidence of the comments by the police chief. Although the town claimed the alleged statements were merely stray remarks, the court found that a connection could be drawn between the statements and the promotion decision.

Employee Harassed Based on Heterosexuality Cannot Establish Claim under Title VII

Rebecca Medina was employed by the State of New Mexico's Income Support Division. According to Medina, her supervisor, a lesbian, sent Medina unwelcome e-mails with sexual content and made sexually-charged comments. Medina interviewed for a promotion within the agency, but her supervisor awarded the promotion to another woman. Medina complained to the human resources department, alleging that she had been subjected to a hostile work environment and that lesbians received preferential treatment in the agency. Human resources investigated and concluded that the majority of Medina's claims could not be substantiated. Medina subsequently resigned and accepted a job with another New Mexico agency. After her resignation, the Income Support Division director gave Medina a warning letter for knowingly bringing false claims to human resources but the letter was never placed in her personnel file.

Medina filed a lawsuit against the Income Support Division, alleging that she was subjected to a hostile work environment and retaliated against in violation of Title VII of the Civil Rights Act of 1964. In Medina v. Income Support Division, State of New Mexico (6/28/05), the U.S. Court of Appeals for the Tenth Circuit dismissed Medina's claims. The court observed that a plaintiff alleging same-sex harassment under Title VII must establish that she was discriminated against because of her sex. Medina did not claim that she was harassed because of her sex, but because she is a heterosexual. The court determined however, that Title VII's protections do not extend to harassment due to a person's sexuality. Medina's retaliation claim failed because she did not establish any adverse employment action. The warning letter was not placed in her file and there was no evidence that any future employer could discover the letter. Moreover, Medina could not overcome the Income Support Division's evidence that Medina was less qualified than the employee who was promoted by Medina's supervisor.

Handbook Policy Encouraging Reporting of Union Coercion Violates NLRA

Brandeis Machinery & Supply Company's handbook had an employee relations policy that explained that the company was a non-union organization and desired to remain that way. The policy further stated that if any employee interfered or tried to coerce another employee into signing a union authorization card, the incident should be reported to a supervisor and the company would see that the harassment was stopped immediately. The International Union of Operating Engineers began an organizational campaign at a Brandeis facility. After an employee complained about union solicitations, company representatives met with the employees and stated that if the union got so aggressive that the employees felt they were being harassed, management needed to know about it and would stop the harassment. The Union subsequently filed unfair labor practice charges against Brandeis with the National Labor Relations Board. After a hearing, an administrative law judge found that Brandeis committed a number of unfair labor practices, including promulgating a written policy that encouraged employees to report to management any employees who solicited support for a union and verbally encouraging employees to report to management any employees who solicited support for the union. The NLRB affirmed the judge's decision, and Brandeis appealed.

In Brandeis Machinery & Supply Company v. NLRB (6/24/05), the U.S. Court of Appeals for the Seventh Circuit upheld the NLRB's decision. In assessing whether Brandeis interfered with the employees' right to solicit on behalf of the Union's campaign, the appeals court considered the timing of the statements, the words used, whether the statements targeted union supporters, and whether the statements were directed toward employees who were being threatened. As to the handbook policy, the appeals court found significant the fact that the policy was located in a section of the handbook about employee relations and the company's desire to remain union-free and not as part of a more general anti-harassment policy. The focus of the policy was on pro-union activity, and there was no acknowledgement that union opponents may harass or coerce fellow employees into rejecting the union. Furthermore, the handbook policy was not promulgated in response to threats or incidents of violence; it was disseminated to employees when they were hired. Similarly, the statements made by company representatives could have left employees with the impression that legal and protected activity, such as persistent solicitations or invitations to organizational

meetings, could constitute harassment. Therefore, the appeals court agreed with the NLRB that both the handbook policy and the company representatives' statements violated the National Labor Relations Act.

Employee Terminated for Theft based on Police Investigation Did Not Demonstrate Reverse Race Discrimination

Compass Group USA, doing business as Chartwells, provides food and beverage services to educational facilities. Chartwells employed Brandon Bryant, a white male, as a cook. Bryant and two other employees, both Hispanic, worked at a party on a university campus. After the party, one of the employees reported that she saw Bryant take an envelope from the gift table. A university police officer investigated the incident and reported to Chartwells that Bryant confessed to taking the money. Chartwells terminated Bryant's employment based on the police officer's report. Bryant sued Chartwells, claiming, among other things, that the reason for the termination was discrimination based on his race. A jury found in favor in Bryant on his termination claim and Chartwells appealed.

In Bryant v. Compass Group USA, Inc. (6/16/05), the U.S. Court of Appeals for the Fifth Circuit reversed. Bryant could not demonstrate that Chartwells' reason for the termination was pretext or that race was the true motivating reason. Although Bryant disputed that he confessed to the officer, the critical issue was that a disinterested third party, the officer, reported to Chartwells that Bryant confessed, and Chartwells relied on the evidence. Even if the employer's investigation came to an incorrect conclusion, that did not establish a racial motivation. Bryant's argument that a similarly situated Hispanic employee committed theft but was not disciplined failed. The other employee allegedly pilfered alcohol and decorations from the company, not from a client. No reasonable jury could find that the two incidents of alleged misconduct were nearly identical and, therefore, these allegations did not establish reverse race discrimination.

US Department of Labor Issues Opinion Letter on Overtime Pay for Shifts that Overlap Workweeks

The U.S. Department of Labor, Wage and Hour Division issued an opinion letter (5/27/05) on the application of the overtime rules of the Fair Labor Standards Act to shifts that overlap workweeks. The employer requesting the opinion had established a workweek running from 12:01 A.M. Sunday to 12:00 A.M. the following Saturday. Some employees were assigned to work four ten-hour shifts per week. One of these shifts overlapped two different workweeks. For example, the employees' last shift of the workweek began on Saturday at 10:00 P.M. and ended 8:00 A.M. Sunday, so that the first two hours fell within one week and the remaining eight in the following week. The employer inquired whether under the FLSA it could include the eight hours worked on Sunday in the previous workweek—essentially "prepaying" for those eight hours.

The DOL noted that ordinarily compensation must be paid at the time of the employee's regular pay period. However, the DOL stated that under these circumstances it would not object to the employer's "prepayment." The employer could include all hours worked in a single shift in the workweek in which the shift began. The DOL cautioned that non-exempt employees must be paid time and one-half their regular rate of pay for each hour worked over 40 hours in the workweek. Moreover, the DOL warned that such a schedule must not be manipulated by an employer in order to avoid the overtime obligations imposed by the FLSA.