To view this email as a web page, go here.

Labor, Employment & Benefits e-News

JULY 10, 2006

In This Issue

Court Rejects Employee's Claim that Changes to Hours and Duties Several Months after Rehire Violates USERRA

Cheryl Francis worked as a computer technician for Booz, Allen & Hamilton, Inc. During her employment, Francis also was a petty officer in the U.S. Navel Reserves. She was deployed on full time active duty for approximately five months. Upon her return to the company, she retained the same title, salary, and work location. However, several weeks after she was rehired, the company transferred certain functions to another vendor, and Francis was no longer assigned certain duties. Moreover, the company assigned Francis to the late shift, as opposed to the day shift Francis regularly worked before her deployment. The company subsequently placed Francis on probation for leaving work early without authorization, being absent from a conference call, and other conduct that violated company policies. While on probation, Francis again left the office without authorization, and the company terminated her employment. Francis sued the company for violation of the Uniformed Services Employment and Reemployment Rights Act. The trial court dismissed Francis's claims, and she appealed.

In Francis v. Booz, Allen & Hamilton, Inc. (6/22/06) the U.S. Court of Appeals for the Fourth Circuit

upheld the lower court's ruling. The appeals court rejected Francis's claim that the changes to her duties and hours violated USERRA's requirement that an employee be rehired in the same position upon return from military service. The company's reinstatement of Francis to her prior position upon her return from active duty satisfied the USERRA requirements. The changes to Francis's duties and hours did not occur until several weeks after she was rehired and Francis did not provide sufficient evidence that the changes to her duties and schedule were motivated by her military service. Francis's claim that her termination violated USERRA also failed because Francis did not provide evidence sufficient to refute the record of extensive pattern of unprofessional conduct by Francis. [back]

Catholic School Teacher's Publication of Pro-Choice Advertisement is Not Protected Opposition Activity under Title VII

Michele Curay-Cramer taught English and religion classes at Ursuline Academy, a private Catholic school in Wilmington, Delaware. On the 30th anniversary of the U.S. Supreme Court's decision in Roe v. Wade, the News-Journal, a newspaper in circulation in Wilmington, ran an advertisement in support of the decision and the names of about 600 supporters, including Curay-Cramer. After the advertisement was published, school representatives met with Curay-Cramer about her public support of abortion, and Curay-Cramer responded that she believed she had the right to protest the school's stance on abortion without retribution and informed the school that she also volunteered for Planned Parenthood. The school gave Curay-Cramer the option to resign or be terminated. Curay-Cramer refused to resign, and the school terminated her employment. Curay-Cramer subsequently filed a lawsuit against the school, the diocese of Wilmington and several school officials, claiming that her termination violated Title VII of the Civil Rights Act and the Pregnancy Discrimination Act. The lower court dismissed all of Curay-Cramer's claims and she appealed.

In Curay-Cramer v. The Ursuline Academy of Wilmington Delaware, Inc. (6/7/06) the U.S. Court of Appeals for the Third Circuit upheld the lower court's dismissal of Curay-Cramer's claims. The appeals court refused to rule on whether Title VII's opposition clause protects any employee who has had an abortion, who contemplates having an abortion or who supports the rights of women who do so. The court ruled that, even if Title VII protected such activity, Curay-Cramer did not engage in protected activity when she signed the News-Journal advertisement because she could not demonstrate any connection between the advertisement and the school's alleged illegal employment practice of discriminating against women who have had or contemplated having an abortion. Rather, the advertisement was general pro-choice advocacy, and did not mention the school or any alleged illegal employment practices. The appeals court also rejected Curay-Cramer's argument that she was treated less favorably than male employees who committed offenses allegedly similarly egregious under Catholic doctrine, such as opposing the war in Iraq. Although recognizing that Title VII applies to religious employers, the appeals court determined that, in this case, the gender discrimination claim would require the court to assess the relative severity of offenses under Catholic doctrine, and this would infringe upon the First Amendment Religion Clauses. The appeals court declined to meddle in the religious school's ability to decide the severity of offenses pursuant to the Catholic faith. Therefore, the court dismissed Curay-Cramer's gender discrimination claim. [back]

Nurse Who Told Interviewer She Would Refuse To Administer Morning-After Pill May Proceed with Discriminatory Failure To Promote Claims

Andrea Nead, a nurse PRN, worked in the health services department of Eastern Illinois University. Nead applied for a promotion to a staff nurse position and was interviewed by her

supervisor, the director of nursing. During the interview, the supervisor asked Nead whether she would be willing to dispense emergency contraception, known as the "morning-after pill," as part of her duties. Nead responded that she opposed emergency contraception because she considered it a form of abortion, a practice contrary to her religious beliefs. The supervisor told Nead that another candidate was not opposed to dispensing emergency contraception. Nead was passed over for the promotion. She filed a lawsuit against the university and her supervisor, claiming the denial of the promotion violated the U.S. Constitution, Title VII of the Civil Rights Act, and Illinois law. The university and the supervisor sought dismissal of all of Nead's claims.

In Nead v. Board of Trustees of Eastern Illinois University (6/6/06) the U.S. District Court for Illinois ruled that Nead could not proceed on her constitutional claims against the university and the supervisor in her official capacity because the claims were barred by sovereign immunity. Nead's freedom of speech claim also failed because, although her comments touched upon a matter of public concern, they addressed only the personal impact of the issue on Nead, and therefore were not protected. However, the court refused to dismiss the claims against the supervisor in her individual capacity, the Title VII claim, and the claim under Illinois law. Nead's allegations-that she is a member of a religious group that condemns participation in abortion, that she was qualified for the open position, that she told her interviewer about her religious views, and that she was rejected for the position-were sufficient to allow her to proceed on her claims that she was discriminated against based on her religion in violation of Title VII. The court also refused to dismiss Nead's claim based on an Illinois statute which prohibits discrimination against individuals who refuse to provide health care services contrary to their conscience. [back]

Court Rejects New Exception to Rule that General Contractor is Not Liable for Injuries to Subcontractor's Employees

Handler Development, Inc., a general contractor building residential homes in Middletown, Delaware, hired Esperanza Painting as a painting subcontractor. Leandro Tlapechco, an employee of Esperanza, was working on a Handler home painting a second floor balcony area with no safety rail. Tlapechco fell from the open walkway and became partly paralyzed. He sued Handler, claiming that Handler negligently failed to ensure the presence of a safety rail. Handler challenged Tlapechco's claims, citing a general rule that a general contractor owes no duty to an independent contractor's employees, unless an exception applies. The trial court judge created a new exception to the general rule of no liability, which she called the "obvious safety hazard exception." The trial court instructed the jury that the new exception would apply if there was an obvious safety hazard on the construction site, the hazard created a safety issue for more than one subcontractor, and the risk of danger was not inherent to the type of work performed by any one subcontractor. Applying the new exception, the jury awarded Tlapechco a verdict of more than $5,000,000 against Handler. Handler and Tlapechco both appealed.

In Handler Corporation v. Tlapechco (6/6/06) the Supreme Court of Delaware rejected the lower court's new "obvious safety hazard exception" as contrary to Delaware law, and concluded that it was erroneous for the lower court to instruct the jury on the exception. Although it rejected the new exception, the court ruled that one of the other exceptions to the general rule against general contractor liability may apply in this case. The court noted that there was evidence that Handler assumed responsibility for workplace safety, including that Handler contracted with another company to install a safety railing, that only weeks before Tlapechco's fall, Handler conducted a safety instruction talk with its employees, and that the contract between Handler and Esperanza required Esperanza to take safety precautions and to notify Handler of any safety deficiencies. Therefore, the court ordered a new trial. [back]

Employer that Responds to Unverified EEOC Charge Waives Right to Contest Jurisdiction in Future Legal Proceedings

Kathleen Buck worked as a secretary for the superintendent of the Hampton Township School District. She submitted completed questionnaires with the U.S. Equal Employment Opportunity Commission alleging discrimination on account of her sex and disability. The EEOC asked Buck to come into its office to file a charge of discrimination with a supporting affidavit. Instead, Buck filed a detailed, eight-page charge of discrimination signed by her attorney. The EEOC sent a notice of charge to the school district and the school district responded by denying any discrimination. After the EEOC issued a right to sue letter, Buck filed a lawsuit in federal court alleging harassment, disparate treatment, failure to accommodate and retaliation under the Americans with Disabilities Act. The school district filed a motion to dismiss on the ground that Buck failed to submit a charge under oath. The trial court dismissed Buck's lawsuit and she appealed.

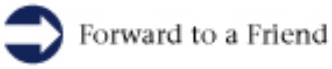
In Buck v. Hampton Township School District (6/30/06) the U.S. Court of Appeals for the Third Circuit ruled that an employer, by responding to an unverified charge of discrimination filed with the EEOC, waives its right to assert in federal court proceedings that the charge was fatally defective because it was not sworn to by the employee. The appeals court noted that neither of the intake questionnaires nor the charge was signed under oath as required by the ADA or the EEOC regulations. Although the appeals court explained that a verified charge is mandatory, it recognized that employers may waive that mandatory requirement. The court reasoned that, allowing an employer to contest a charge and then later claim it was fatally defective, is inequitable and unfair to employees who often file charges without the benefit of legal counsel. As a result, the appeals court reinstated Buck's lawsuit. [back]

Employee Entitled to Interest and Attorneys' Fees in Retaliation Case before MCAD

William DeRoche was a lead lineworker in a home service crew for the Wakefield Municipal Gas & Light Department. DeRoche retired at age 65, believing that his retirement was mandatory, but subsequently discovered that there was a change to the public employee retirement statute that would have allowed him to work until age 70. DeRoche filed a claim against the Department with the Massachusetts Commission Against Discrimination, alleging that his forced retirement constituted age discrimination in violation of Massachusetts law. The Department reinstated DeRoche, but assigned him to the position of lead lineworker in a line crew, a more dangerous and physically demanding position than his former position. DeRoche amended his MCAD complaint, alleging that the change in position was retaliation for having filed the age discrimination complaint. The MCAD dismissed the discrimination claim, but found in favor of DeRoche on the retaliation claim and awarded him back pay and emotional distress damages. DeRoche appealed to court, seeking interest on the damages award, and the department appealed the adverse decision on the retaliation claim. The lower court affirmed the finding of retaliation and awarded interest, but declined to award DeRoche attorneys' fees and costs. Both parties appealed.

In DeRoche v. Massachusetts Commission Against Discrimination (6/12/06) the Massachusetts Supreme Court found that DeRoche was not entitled to emotional distress damages. The court observed that, in order to recover emotional distress damages, an employee must present substantial evidence of emotional suffering that occurred and a connection between the suffering and the employer's actions. Although DeRoche presented evidence of distress he suffered as the result of his early retirement, he did not present evidence of emotional distress suffered because

of his reinstatement to a different position, which was the basis for the retaliation claim. However, the court affirmed the award of interest on the back pay award, ruling that although the Department was a public entity, the Massachusetts legislature had expressed its intention that sovereign immunity with respect to interest on damages for a retaliation claim had been waived. Finally, the court concluded that DeRoche was entitled to attorneys' fees and costs expended in the proceedings before the MCAD and in his appeal of the MCAD decision to court. [back]



For more information, please contact Stephen Aronson or Alice DeTora or phone either of them at 800-826-3579.
Visit our Labor, Employment and Benefits website at www.rc.com.
To view back issues, visit our searchable archives. If you would like certain information covered in future communications, let us know. We welcome your feedback.