ROBINSON & COLE LLP
LABOR, EMPLOYMENT AND BENEFITS

eNews

E-news is an electronic newsletter reporting recent developments in labor, employment and benefits law.

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U.S. Supreme Court Declines to Hear ADA Case by Fired HIV-Positive Dental Hygienist

Spencer Waddell, a former dental hygienist who is HIV-positive, claimed that a Georgia dental practice violated the Americans with Disabilities Act by demoting and firing him because of his HIV-positive status. The U.S. Court of Appeals for the Eleventh Circuit dismissed Waddell's lawsuit, ruling that he was not protected by the ADA because he posed a significant risk to the safety of co-workers and patients. Waddell appealed this decision to the U.S. Supreme Court. InWaddell v. Valley Forge Dental Association, Inc. (5/28/02), the Supreme Court declined to hear Waddell's appeal and allowed the Eleventh Circuit's dismissal to stand.

Police Officer's Racist Mailings Not Protected by Free Speech

Thomas Pappas was a police officer employed by the New York City Police Department

from 1982 through 1999. He worked in the NYPD's management information systems division, which was responsible for maintenance of its computer systems. On at least two occasions in 1996 and 1997, Pappas received letters at his home from an auxiliary police department in Long Island soliciting charitable contributions and enclosing reply envelopes for returning contributions. Pappas stuffed the reply envelopes with racially bigoted materials, including printed flyers conveying anti-Black and anti-Semitic messages, and returned them anonymously. Upon receipt of these materials, the Nassau County Police Department began an investigation to identify the sender. To that end, it sent out a charitable solicitation mailing using coded return envelopes. Once again, Pappas returned an envelope stuffed with racist materials. The coded envelope traced the source to a post office box registered by Pappas. The Nassau County Police Department then issued another mailing, with the same result. The Nassau County Police Department notified the NYPD's Internal Affairs Bureau of its findings. Internal Affairs repeated the investigative experiment, sending Pappas further charitable solicitation mailings, which Pappas once again returned with similarly racist materials. Internal Affairs then confronted Pappas, who admitted to sending the materials in response to the solicitations.

The NYPD charged Pappas with violating regulations and convened a disciplinary hearing. As a defense, Pappas asserted that he sent the materials because he "was protesting" and "was tired of being shaken down for money by these so-called charitable organizations." Pappas was found guilty of violating regulations by disseminating defamatory materials through the mails and his employment was terminated. Pappas then filed a federal lawsuit against officials of the City of New York and the NYPD, claiming that his termination violated his free speech rights protected by the First Amendment of the U.S. Constitution. The trial court dismissed the lawsuit and Pappas appealed.

In Pappas v. Giuliani (5/13/02), the U.S. Court of Appeals for the Second Circuit affirmed dismissal of the action. The Second Circuit acknowledged that there was no dispute that Pappas was terminated because of his speech and would not have been terminated were it not for his speech. However, the appeals court ruled that the NYPD's interest in fulfilling its mission could be seriously undermined by a public perception of racism and that interest outweighed Pappas's interest in pronouncing his anti-Semitic and anti-Black views. One judge wrote a dissenting opinion, arguing that it was unclear that the NYPD's interest in fulfilling its mission outweighed Pappas's free speech rights, given that Pappas did not hold a high level job, did not purport to speak for the NYPD, and anonymously mailed the materials from his own home on his own time.

Employee Failed to Show Supervisors Knew or Should Have Known of Racial Harassment

Joyce Jacob-Mua, an African-American employee of the U.S. Department of Agriculture's National Agri-Forestry Center, claimed that the Center violated Title VII by subjecting her to a racially hostile work environment. Jacob-Mua alleged that a co-worker harassed her by asking her "what is it like to be black," how often she washed her hair, how much it cost to

braid her hair, and "when she was leaving America and going back to Africa," by commenting that "slavery wasn't all that bad," and by throwing a set of keys at her. However, Jacob-Mua only reported the key-throwing incident to her supervisor and she did not indicate at that time that the altercation had any racial motivation. For these reasons, the trial court refused to hold the Center liable for the co-worker's alleged actions and dismissed Jacob-Mua's lawsuit. On Jacob-Mua's appeal, in Jacob-Mua v. Veneman (5/8/02) the U.S. Court of Appeals for the Eighth Circuit affirmed the dismissal, ruling that Jacob-Mua's supervisor did not know, nor should have known, of any racial bias, and therefore the Center was not liable for the co-worker's conduct.

Employee Discharged after Joining Wage and Hour Lawsuit May Proceed with Retaliation Claim

Antonio Burruel worked as a produce department manager for Food 4 Less Warehouse Stores. For the first five years of his employment, Burruel received favorable performance reviews. However, when Burruel experienced personal difficulties related to the breakup of his marriage, his performance steadily declined. Over the next six months, Burruel's supervisor removed some of his job responsibilities, repeatedly criticized him about the conditions of the produce department, suspended him from work for three days, and warned of future discipline up to and including discharge. The following year, Burruel learned of a class action lawsuit filed by produce managers who claimed they were classified improperly as exempt managerial employees and were not paid overtime wages to which they were entitled under California law. Burruel continued to receive criticism from his supervisor and, consequently, was suspended again later that year. Burruel joined the class action lawsuit. Approximately one month later, Food 4 Less terminated Burruel's employment.

Burruel sued Food 4 Less, claiming that his termination constituted unlawful retaliation for joining the class action lawsuit. The lower court dismissed his claim, finding that the termination was based on Burruel's poor job performance. Burruel appealed. In Burruel v. Food 4 Less Holdings, Inc. (5/9/02), the California Court of Appeals reversed the dismissal, questioning whether Burruel's participation in the class action suit was a factor in his discharge. The appellate court explained that the fact that Food 4 Less retained Burruel for a significant amount of time despite his alleged poor job performance and that it decided to discharge him only one month after he joined the class action raised questions as to whether the decision was a pretext to retaliate for his having joined the lawsuit.

Retired Employee May Sue Over Pension Dispute without Exhausting Grievance Procedures

Daniel Phillips was a police officer employed by the New Britain, Connecticut Police Department, and was a member of the Union. Phillips retired from employment. Later, a dispute arose between Phillips and the City over whether Phillips was entitled to a pension

based on twenty years of service. The dispute centered on whether periods of time when Phillips was on administrative leave without pay counted towards years of service. The City ultimately denied Phillips' pension claim.

Phillips sued the City, alleging that the denial of his pension request violated the collective bargaining agreement between the City and the Union. The City tried to dismiss the lawsuit because Phillips did not follow the grievance procedures mandated by the collective bargaining agreement and, therefore, failed to exhaust his administrative remedies. Phillips argued that, following his retirement, he was no longer an employee of the City and, as such, lacked the ability to pursue a grievance and to exhaust his administrative remedies. In Phillips v. City of New Britain (3/26/02), the Connecticut Superior Court agreed with Phillips, explaining that retirees are not employees for purposes of the National Labor Relations Act and that a union that represented the retirees while they were active members of the bargaining unit is under no statutory obligation to represent them in negotiations with their former employer.

Employees Terminated for Refusing to Sign Mandatory Arbitration Agreements Have No Retaliation Claim

Harden Manufacturing issued new employee handbooks that included a mandatory arbitration policy. The policy required that all employment claims, including claims of discrimination, be resolved through arbitration. Harden required all employees to agree to the policy as a condition of continued employment. Anthony Weeks and four other employees were terminated after they refused to agree to the policy. Following their discharge, the five former employees sued Harden for unlawful retaliation under Title VII, the Age Discrimination in Employment Act, and the Americans with Disabilities Act. Harden asked the trial court to dismiss the lawsuit, arguing that the former employees did not engage in statutorily protected conduct because the mandatory arbitration provision was not an unlawful employment practice. The trial court denied Harden's request and Harden appealed.

In Weeks v. Harden Manufacturing Corp. (5/22/02), the U.S. Court of Appeals for the Eleventh Circuit dismissed the lawsuit. The Eleventh Circuit ruled that the employees' refusal to agree to the arbitration policy did not constitute protected activity, defeating any claims. The appeals court reasoned that arbitration agreements to resolve disputes between parties now receive near universal approval and, therefore, any belief that the policy was unenforceable would not have been reasonable. The appeals court also explained that, even if the arbitration policy was found to be unenforceable, requiring employees to sign it would not constitute an unlawful employment practice under Title VII, the ADEA, or the ADA.

Hartford Firefighters Awarded $3.2 Million for Reverse Race Discrimination

Seven White and two Hispanic firefighters alleged that the City of Hartford and its Fire Chief violated Title VII by manipulating the civil service promotion list for purposes of

affirmative action. The firefighters claimed that they were at the top of a promotion list, which the Fire Chief intentionally allowed to expire without promoting them, and that he instituted a new list four months later with the names of African-American firefighters at the top of the list. They claimed that the Fire Chief should have extended the original list by one year and asserted that they, rather than the African-America firefighters, would have been promoted if that had occurred. In Peterson v. City of Hartford (4/11/02), a jury in U.S. District Court for Connecticut found that the Fire Chief's actions constituted unlawful reverse race discrimination and awarded them a total of $3.2 million in economic, non-economic, and punitive damages.

Coca-Cola Agrees to Pay $4.2 Million in Affirmative Action Settlement

Pursuant to a settlement with the Office of Federal Contract Compliance Programs, the Coca-Cola Company will pay a total of $4.2 million to approximately 2,000 women and minority employees from Coca-Cola's corporate headquarters in Atlanta, Georgia, who the OFCCP found were underpaid. The settlement payments constitute back wages, bonuses, and interest. Coca-Cola also announced that it will voluntarily pay approximately $3.9 million to 1,100 current and former minority and female employees in North America after a separate internal audit discovered additional pay discrepancies in other departments.

For more information, please contact us

Stephen W. Aronson	Andrew S. Golden	Alida Bogran-Acosta
860-275-8281	860-275-8309	617-557-5923

ROBINSON & COLE LLP
Boston - Hartford - New London - Stamford - Greenwich - New York

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