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Circuit By Circuit  
National Corporate News By Region  
Circuit Roundup

**Debbi Mack**

#### **4<sup>TH</sup> CIRCUIT 'Girls Gone Wild' Pays For Filming Without Consent**

A Virginia state jury on June 29 awarded \$60,150 to Debbie Aficial, a Virginia Beach woman whose image appeared in a "Girls Gone Wild" video without her written consent.

In February 2003 Aficial and Aimee Davalle attended a promotional event at a Virginia bar that was hosted by Mantra Films Inc., which produces the "Girls Gone Wild" videos. The company's owner and a film crew approached the girls about making a video. The crew persuaded Davalle to reveal her breasts and pubic area on camera, according to court filings. They also filmed Aficial, although she didn't expose herself. Both women appeared in "Girls Gone Wild: The Seized Video," which Mantra released in fall 2004. Davalle's picture was on the cover of the video.

Both women sued Mantra and the bar after the video came out. In her suit, Aficial claimed she never gave written consent for Mantra to use her name or image in the video, as required by state law. Aficial later dropped her claims against the bar.

The award includes \$60,000 in punitive damages and \$150 in compensatory damages. The court also awarded Aficial court costs.

Last February, the court ordered Mantra Films to stop producing the video, but let it continue selling inventory copies, according to Kevin Martingayle, a partner at Stallings & Bischoff who represents both plaintiffs.

Davalle's suit is scheduled for trial Nov. 29.

#### **5<sup>TH</sup> CIRCUIT Court Sends ADA Suit To Arbitration**

The 5th Circuit ruled an ex-employee's suit against Dillard's Inc. for unlawful firing must go to arbitration.

Karen Marino was allegedly injured in 1993 while working at a Dillard's Department Store in Metairie, La. The injury impaired her ability to stand and walk for long periods, but Marino said she could work, subject to her doctor's restrictions. Marino's new supervisor allegedly started making greater physical demands on her in 2001. She claimed the demands led to foot problems that required surgery in October 2002. After the surgery, the company allegedly told Marino it had no openings that accommodated her restrictions, but extended her sick leave to one year. Dillard's ultimately fired her in October 2003 for failure to "return from leave of absence."

Marino sued Dillard's in Louisiana federal court in January 2004 for unlawful termination and failure to provide accommodations as required under the ADA. Dillard's moved to

dismiss or stay the case and compel arbitration under a program it started while Marino was employed with Dillard's. The company argued that Marino had agreed to arbitration by staying with the company after she got notice of the policy. Marino opposed arbitration on the grounds she didn't agree to it in writing.

The district court ruled for Marino, finding Louisiana law required written consent to arbitration. The 5th Circuit reversed. Circuit Judge Emilio M. Garza noted in the June 21 opinion that state law allows a contract to be accepted by action or inaction, as was the case here.

The district court stayed the case, pending the arbitration's outcome.

### **8<sup>TH</sup> CIRCUIT Health Plans Must Cover Contraceptives**

A Nebraska federal court ruled July 22 that Union Pacific Railroad Co. discriminated against its female employees because its health plans didn't cover prescription contraceptives.

The railroad offered five employee health plans, none of which covered prescription contraceptives unless they were used for a noncontraceptive purpose. The railroad's female employees filed a class action suit alleging the disparity in coverage violated Title VII.

The federal court granted summary judgment for the plaintiffs. It noted that lack of insurance coverage for prescription contraceptives had a disparate impact on women because only women can get pregnant, and pregnancy has "a profound impact on a woman's health."

To demonstrate the health effects of pregnancy in gender-neutral terms, District Judge Laurie Smith Camp posed a hypothetical in which a man develops a condition that causes such symptoms as extreme fatigue, nausea and vomiting, leg cramps and swelling and abdominal expansion to twice its normal size, with the potential to develop diabetes, high blood pressure and depression.

The court wasn't persuaded by Union Pacific's arguments that a health plan that didn't cover contraceptives used by either sex was legally sufficient. "A male contraceptive, used for contraceptive purposes, has no beneficial impact on the health of the male," Judge Camp wrote. "Even if a male prescription contraceptive were available, Union Pacific's exclusion of coverage for prescription contraceptives for men and women would still affect only the health of women."

Judge Camp also noted that at least one plan covered prescriptions and treatment for male-pattern baldness, erectile dysfunction and "other medical conditions that are no greater threat to employees' health than is pregnancy."

### **10<sup>TH</sup> CIRCUIT Court Halts Transsexual Bus Driver's Suit**

A Utah federal court ruled a transsexual bus driver couldn't sue her former employer for discrimination under Title VII after the company fired her due to concerns over letting her use women's restrooms.

Michael Etsitty changed his name to Krystal Etsitty and his driver's license designation to female in 1999. Etsitty had taken female hormones, but still had male genitalia when she started working for the Utah Transit Authority (UTA) in October 2001. After she was hired, she told her supervisor she was undergoing a sex change and would start dressing more like a woman at work. Some businesses on bus routes let UTA drivers use their

restrooms, and Etsitty's supervisor became concerned about potential liability if Etsitty used women's rooms while she still had male genitals. UTA fired Etsitty, allegedly because it was impractical to make special restroom arrangements for her. The company said she was eligible to get her job back after sex-change surgery.

Etsitty sued UTA, claiming gender discrimination under Title VII and equal protection violations. The court granted judgment for UTA, finding that transsexuals aren't protected under Title VII and that, in any event, the company had a legitimate, nondiscriminatory reason for firing Etsitty.

"Plaintiff, although in the process of changing her sex, still had male genitalia, and there is no evidence that [her supervisor's] stated concern about restroom usage was pretext for discrimination," Senior District Judge David Sam wrote in the June 24 opinion.

### **11<sup>TH</sup> CIRCUIT DuPont Accused Of Misleading Consumers**

A group of Florida residents filed a class action suit against E.I. DuPont de Nemours & Co., alleging the company concealed information indicating Teflon might be harmful to consumers and misled the public by stating that it's safe.

Filed July 15 in Florida federal court, the suit states claims for unfair and deceptive trade practices, negligence and strict liability. The plaintiffs seek damages and want DuPont to fund medical monitoring of consumers who have used Teflon cooking products and more research on Teflon's possible health effects. They also want DuPont to put a warning label on Teflon products.

Much of the controversy over Teflon's safety focuses on an ingredient, perfluorooctanoic acid (PFOA), which gives Teflon its non-stick quality. According to the complaint, DuPont has known for years about the possible health risks related to PFOA, but has kept the information from the public and continued to claim Teflon is safe for consumer use.

Last year, the EPA brought two enforcement actions against DuPont for allegedly violating the Toxic Substances Control Act by failing to report information about PFOA's potential health risks. A federal grand jury subpoenaed DuPont regarding its use of PFOA in May 2005.

The complaint also claims that extremely hot Teflon releases many other toxic substances in addition to PFOA. More than 40 years ago DuPont tested the possible link between Teflon fumes and worker sickness, according to the complaint. After the test, the company allegedly started requiring workers to wear respirators around extremely hot Teflon, but continued to claim the coating didn't emit hazardous chemicals through normal use.