
ROSSWAY MOORE & TAYLOR

ATTORNEYS AND COUNSELORS AT LAW

JOHN E. MOORE, III*
BRADLEY W. ROSSWAY
HELEN E. SCOTT
MICHAEL J. SWAN
JAMES A. TAYLOR, III*
THOMAS W. TIERNEY**

THE OAK POINT PROFESSIONAL CENTER
5070 NORTH HIGHWAY A-1-A, Suite 200
VERO BEACH, FLORIDA 32963
TELEPHONE (772) 231-4440 FACSIMILE (772) 231-4430
Web site: www.verobeachlawyers.com

SHANNON BANITT
PATRICK FARRAH
LISA GALLAGHER
DEBORAH MARTIN-LEE
KEVIN ROLLIN

January 2010

*also admitted in
The District of Columbia
**also admitted in California

LEGAL AND LEGISLATIVE UPDATE

The following is provided as a complimentary service to the firm's clients. It is designed to assist the reader in keeping informed of selected developments in employment law. It is not intended to be nor is it a treatment of all new developments in the field of labor and employment law. Applicability to a particular situation depends upon an investigation of the specific facts and more exhaustive study of the applicable laws than can be provided in this format. This summary is not intended to be a substitute for legal advice.



Miscellaneous

EEOC Reported Record High Volume and Recovery

The Equal Employment Opportunity Commission received 93,277 private sector discrimination charges in fiscal year 2009 ending September 30, 2009, and obtained \$294.1 million for alleged discrimination victims through administrative enforcement. Administrative enforcement does not include litigation brought by the EEOC against employers. In addition, the EEOC has increased its workforce an additional 125 investigators, 22 trial attorneys, 50 support staff, 10 paralegals, and five expert statisticians and labor economists. However, they are still having difficulty keeping up with the case load because of the passage of the ADA Amendments Act and Lilly Ledbetter Fair Pay Act. GINA will also be enforced by the EEOC further adding to the workload and their backlog. If you have an EEOC charge pending, don't expect a speedy response from them.

Proposed ADAAA Regulations

Employer groups including the Society of Human Resource Management, have voiced their objections to the regulations proposed by the Equal Employment Opportunity Commission, finding them inconsistent with the intent of the ADAAA, outside the scope of the EEOC's authority, and contrary to the compromises made between the disabled community and the business community that led to the enactment of the ADAAA. This legislation received bipartisan support as well, largely because of the negotiations and compromises made by the disabled and business. Under the proposed regulations, almost any impairment or symptom of impairment may result in ADA protection. Originally, to be considered disabled, the individual had to have an impairment that substantially limited one or more major life activities. The focus appears to have shifted to whether the individual has an impairment. This opens up a whole universe of problems for employers with visions of minor ailments like flu becoming protected by the ADA. The

proposed regulations do not redefine the term “substantially limits” as directed by Congress. The proposed regulations also list *per se* disabilities that the EEOC says will consistently meet the proposed definition of disability, although there is no statutory basis for such a list. It fails to consider people in remission or people who have no limiting symptoms as a result of these disabilities. Employer groups argue that if it does not substantially limit a major life activity it is not a disability. The EEOC plans to finalize the regulations in July. If the proposed regulations are implemented as drafted, employers will have a good argument that certain of the regulations exceed the scope of the EEOC’s authority and are not entitled to judicial deference.

COBRA LAW EXPANDED AND EXTENDED

President Obama signed into law on December 21, 2009, an extension and expansion of a COBRA premium subsidy law that was due to expire on 12/31/09. The extension means new compliance obligations for employers, as the subsidy eligibility period program now runs through 2/28/10. The subsidy period is expanded by six months and new notice requirements must be met within a tight time frame. Plan administrators must provide a notice on extension rights to assistance-eligible individuals who did not timely pay the COBRA premium for any period of coverage during their transition period (consisting of any period of coverage that begins before the extension's enactment date), or paid the full (non-subsidized) premium without regard to the subsidy rules. The notice must be provided within the first 60 days of their transition period and must include information on the ability to make retroactive premium payments as a result of the transition period. In the case of an assistance-eligible individual who, during his or her transition period, paid the full premium amount for such coverage without regard to the subsidy amount, the American Recovery and Reinvestment Act’s rules will apply

allowing for that assistance-eligible individual to be reimbursed for the excess premiums.

Minimum Wage

Florida Minimum Wage Unchanged

Florida’s minimum wage is unchanged for 2010. The State will continue to use the Federal minimum wage effective July 24, 2009 of \$7.25 until it revises it January 2011.

Discrimination

ADA Retaliation

Employees bringing retaliation claims under the ADA are not entitled to compensatory or punitive damages or a jury trial. The 1991 Civil Rights Act amended several employment discrimination statutes to authorize damages, but only for certain listed claims, and ADA retaliation claims are not included. In an ADA case, an employee is entitled to recover make-whole equitable relief on a retaliation claim such as back pay and front pay. *Alvarado v. Cajun Operating Co.*, No. 08-15549 (9th Cir. 2009)

Evidence of Sexual Harassment

Four employees sued their employer claiming *quid pro quo* and hostile work environment sexual harassment as well as retaliation. The jury returned a verdict in favor of all four plaintiffs and the employer appealed. The employer alleged that pursuant to the Federal Rules of Evidence, the jury should not have been permitted to consider the employer’s other bad acts of sexual harassment which the plaintiffs portrayed as intimidation and making sexual overtures to his female subordinates. The appellate court rejected the employer’s argument stating the evidence could be used to prove intent, plan, motive, knowledge, and absence of mistake or

accident. *Alaniz v. Zamora-Quezada*, No. 07-40325 (5th Cir. 2009).

Saving Money Not Unlawful Motive Under ADEA

A teacher sued her employer for age discrimination alleging the school district failed to renew her employment contract because they wanted to save money and avoid paying retirement pay and benefits. The Tenth Circuit Court of Appeals held that neither reason violated the Age Discrimination in Employment Act because age was not the “but for” cause for the termination. Further, the teacher failed to prove that the school district’s savings would differ if the terminated teacher was not in the protected age group. Finally, there was no evidence that the eligibility for retirement and cost of benefits was greater for the teacher because of her age. *Reeder v. Wasatch County School District*, No. 08-4048 (10th Cir. 2009)

Florida Workers’ Compensation Retaliation

A worker injured his wrist and was unable to work for three months. He was then released to light duty work with the limited use of his injured hand and weight lifting restrictions but his employer advised that there was no light

duty work. When he was released to full duty without restrictions two months later, the employer advised that there was no work for him and he was removed from the payroll. The worker sued alleging retaliation under §440.205 Florida Statutes which prohibits employers from discharging, threatening to discharge, intimidating, or coercing any employee because the employee validly claimed workers’ compensation or attempted to claim compensation under the workers’ compensation law. Although the lower court granted summary judgment to the employer on the claim, Florida’s Third District Court of Appeals reversed ruling that there were disputed facts that needed to be resolved. First, was the worker fired or did he fail to request a return to duty; and if the worker was fired, was it in retaliation for making a workers’ compensation claim. It is important to note that retaliation does not include failing to return the employee to work. The retaliation provision is basically telling employers to treat employees who have been injured on the job no differently than they treat employees who are injured off the job. If an employee claiming workers’ compensation is treated less favorably, it may result in a retaliation claim. *Ortega v. Engineering Systems Technology, Inc.* No. 3D08-1607 (Fla. 3rd DCA 2010)