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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.

Discrimination

Sex Discrimination Class Action

A federal jury found Novartis Corp. liable for sex discrimination against a nationwide class of female sales representatives, awarding \$3.4 million for emotional damages to 12 plaintiffs who testified as witnesses in the case. The jury deliberated more than four days, and found for the plaintiffs on claims of pay, promotion, and pregnancy discrimination. It also granted punitive damages of \$250 million. Additional damages remain to be determined by the judge, who must also decide how to distribute the punitive award to the class. *Velez v. Novartis Corp.*, No. 04 Civ. 9194 (S.D. NY 5/17/10)

Retaliation

An African-American employee brought suit in the United States District Court alleging that she was the victim of racial discrimination with respect to training opportunities, performance evaluations, and salary decisions during her

employment. She also claimed that she was subjected to unlawful retaliation, a hostile work environment, and constructive discharge. Central to the latter three claims was plaintiff's contention that the employer failed to investigate a complaint of discrimination that she allegedly made to the company's senior director of employee relations.

The court held that the plaintiff failed to show that her employer's decision not to investigate her complaint of race discrimination was a retaliatory adverse action prohibited by the Civil Rights Act of 1866 (42 U.S.C. §1981). The anti-retaliation law "protects an individual not from all retaliation, but from retaliation that produces an injury or harm." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67 (2006). A plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it might have dissuaded a reasonable worker from making or supporting a charge of discrimination. "We speak of *material* adversity because we believe it is

important to separate significant from trivial harms.” *Id.*

The appeals court agreed with the trial court's reasoning that the company's inaction as to the employee's complaint was not an adverse employment action because a retaliation claimant must show affirmative efforts to punish the employee for making the complaint. An employee, whose complaint is not investigated, cannot be said to have suffered a punishment for that complaint because her employment situation is the same as it would have been had she not brought the complaint or had the complaint been investigated but denied. *Fincher v. Depository Trust & Clearing Corp.*, 109 FEP Cases 467 (2d Cir. 5/14/10).

Americans with Disabilities Amendments Act

In one of the first cases decided under the ADAAA, a manager of a uniform rental company disclosed to the company president that he was HIV-positive. The next day, the manager was discharged. The manager alleged that the company president impermissibly inquired into his medical status although the manager's job performance was satisfactory. The company alleged that the manager failed to prove he was disabled under the ADA because he failed to plead that he had any limitation of a major life activity. In finding for the manager against the company, the court emphasized that although Congress left intact the ADA's three-category definition of “disability” when it passed the ADA Amendments Act, it made significant changes in how these categories are interpreted. The ADA Amendments Act clarified that the operation of ‘major bodily functions, including an individual's immune system, are major life activities for purposes of the ADA's definition of actual disability, the court said. The amended law provides that an impairment “that is episodic or in remission” is a covered disability if it would substantially limit a major life activity when active, the court said. In

addition, the Equal Employment Opportunity Commission's proposed rule interpreting the ADAAA lists HIV as an impairment that will consistently meet the definition of disability. Therefore, the manager may proceed with discrimination and impermissible medical inquiry claims under the amended Americans with Disabilities Act. *Horgan v. Simmons*, No. 09 C 6796 (N.D. Ill. 4/12/10)

No Sex Discrimination Found

A female employee, discharged by a railroad allegedly for causing a train to derail, failed to establish a *prima facie* case of sex discrimination, even though a male employee who had caused a derailment resulting in greater property damage and critical injuries to a crew member was only suspended for 30 days. In employment discrimination cases, the plaintiff need not demonstrate an exact correlation with the employee receiving more favorable treatment for the two to be considered ‘similarly situated;’ rather, this court has held previously that the plaintiff and the employee with whom the plaintiff seeks to compare himself or herself must be similar in ‘all of the *relevant* aspects.’ The plaintiff and her male comparator were disciplined by different decision makers and at all relevant times they had different supervisors. Further, the company had disciplined the plaintiff on three occasions for safety violations, while the male employee had only one non-safety violation. Plaintiff's derailment was caused by her dangerous assumption, while his was due to misinformation, and the incidents were not of comparable seriousness. Therefore, the two employees were not similarly situated and the plaintiff failed to prove discrimination. *Corell v. CSX Transp. Inc.*, 109 FEP Cases 689 (6th Cir. May 19, 2010).

Supreme Court Unanimously Decided in Favor of Black Firefighters

Black applicants for firefighter in Chicago claimed that Chicago's exam had a disparate impact based on race. While nearly 40% of

the applicants were black, they made up only 11.5% of the group passing the test. The city chose exclusively from that applicant pool when hiring 11 separate classes of firefighters over a five-and-a-half-year period. More than 300 days after the first hiring decision, a group of rejected applicants filed discrimination charges which eventually went to court. The trial court dismissed the case finding it to be filed untimely. The Seventh Circuit held that the later hiring decisions excluding the qualified scoring applicants were an automatic consequence of the original test scores. As a result, the appellate court found that the statute of limitations barred all of the claims. The U.S. Supreme Court disagreed finding unanimously for the black firefighters. Justice Scalia explained that each time the city used the allegedly unlawful employment practice (the test results), it gave rise to a separate and freestanding disparate impact claim because the city used the same practice each round of hiring. *Lewis v. City of Chicago*, No. 08-974 (May 24, 2010), reversing and remanding 528 F.3d 488 (7th Cir 2008).

New Regulations

New Federal Child Labor Regulations Issued

The Labor Department's Wage and Hour Division has updated protections under the Fair Labor Standards Act for young workers in nonagricultural employment, according to final regulations published in the May 20 *Federal Register* (75 Fed. Reg. 28,403). In a summary of the regulations, DOL said since the rules were proposed in 2007, the agency has been studying changes in the American

workplace, including "the introduction of new processes and technologies, the emergence of new types of businesses where young workers may find employment opportunities, the existence of differing federal and state standards, and divergent views on how best to balance scholastic requirements and work experiences." The regulations contain detailed descriptions of hazardous occupations in which child labor is prohibited. If you hire individuals under 18 years of age, it is important to stay up to date on the child labor laws. To locate the new regulations, go to <http://www.gpoaccess.gov/fr/index.html> and type in 75 Fed. Reg. 28,403.

Miscellaneous

Department of Labor Future Initiative

A new initiative by the DOL seeks to require companies to create Compliance Action Plans to address employment law compliance issues that fall under the purview of the Occupational Safety and Health Administration (OSHA), Mine Safety and Health Administration (MSHA), the Office of Federal Contract Compliance Programs (OFCCP), and the Wage and Hour Division (WHD). The intended goal is for employers to do self audits to find and then correct any violations before the Department of Labor investigator arrives at the workplace. Employers will need to contract with experts in these fields to survey the workplace and recommend corrections. Achieving compliance in this tough economy was apparently not a consideration in this initiative.