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**

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

2101 INDIAN RIVER BOULEVARD, SUITE 200
VERO BEACH, FLORIDA 32960
TELEPHONE (772) 231-4440 FACSIMILE (772) 231-4430
Web site: www.verobeachlawyers.com

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

May 2010

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

Same or Substantially Similar Position

A black Jamaican female, former executive secretary at Plantation General Hospital, filed a complaint alleging violations of Title VII of the Civil Rights Act, the FMLA, the ADA, and various other state and federal laws stemming from allegations of discrimination due to Plaintiff's race, age, handicap, national origin, and gender. Plaintiff claimed that following a sickle cell crisis that required hospitalization and then bed rest, Defendant involuntarily transferred Plaintiff to another position in the Hospital – as Medical Staff Administrative Assistant. Plaintiff contends that the transfer constituted a demotion and asserts that a less qualified, younger Hispanic male was promoted to her former executive secretary position. Following this transfer and an allegedly unfair evaluation of Plaintiff, Defendant terminated Plaintiff's employment. Plaintiff contends that Defendant's actions were discriminatory and were made in retaliation for Plaintiff's taking of FMLA leave despite the Hospital's contention that she retained same pay, benefits, and schedule. However, the Court found that the transfer could be seen as demotion inasmuch as her responsibilities were significantly diminished, the new position required less skill and was less prestigious, and the fact that her replacement was "promoted" suggests that the hospital regarded her prior position as more prestigious. *Lawson v. Plantation Gen. Hosp.,* No. 08-61826 (S.D. Fla. 2010)

No First Amendment Right to Intimate Personal Relationship in City Employment

The Appellate Court was asked to decide whether Palm Beach County and one of its Fire Department officers violated a firefighter's First Amendment right to intimate association when they demoted him for an extramarital affair with one of his subordinates. The Court conclude that they did not violate the Constitution because the County's interest in discouraging extramarital association between supervisors and subordinates is so critical to the effective functioning of the Fire

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Department that it outweighs the firefighter's interest in extramarital association with a subordinate, even if we assume *arguendo* that the First Amendment protects extramarital association as fundamental right. *Starling v. Board of County Commissioners,* 30 IER Cases 938 (11th Cir. 2010)

Pretextual Reason for Discharge

The Fourth Circuit reinstated a discharged female truck driver's Title VII gender discrimination claim that was dismissed on a motion for summary judgment by the trial court. The plaintiff lost her job after failing a physical fitness test that she was required to take before returning to work from an ankle injury. She was one of only six female drivers out of about 3,000 at the company. The plaintiff claimed the reason for her termination was pretext for sex discrimination because not all drivers were required to take the fitness test, and two male drivers were allowed to return from more serious injuries without being tested. The court found that the employer used the fitness test selectively. Further, the test was a full-body test, divided into six separate components, that evaluates the test taker's general strength, agility, and cardiovascular endurance. It is graded on a pass/fail basis. To pass, an employee must perform various tasks roughly designed to mimic those required of Line Haul and Pickup and Delivery drivers. The plaintiff struggled with several segments of the test and received an overall failing grade. According to the plaintiff, the tasks with which she had problems were unrelated to her ankle injury. For example, on one portion of the test, she was unable to place a box of weights on an overhead shelf simply because the shelf was too high for her (at barely over five feet, one inch tall) to reach. On another part of the test, the plaintiff had difficulty walking backward pulling a cable due to people bumping into her in a crowded hallway. The Court found that "the record as a whole supported plaintiff's claim that a jury could find that discrimination on the basis of gender was afoot." *Merritt v. Old Dominion Freight Line, Inc.,* No. 09-1498 (4th Cir. April 9, 2010).

Refusal to Hire Was Retaliation

The plaintiff began work as a Certified Nursing Assistant (CNA) with Defendant on April 24, 2007. Approximately one month later, Plaintiff left her employment with Defendant after an alleged verbal altercation with a co-worker. On November 14, 2007, Plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC), alleging that she was subjected to harassment based on race which culminated in her constructive discharge in May 2007. On December 5, 2007, Plaintiff contacted her former employer about being re-hired. She claims that she was told that she would not be considered for the position because she had filed a complaint with the EEOC. Plaintiff lodged a second EEOC complaint in April 2008 alleging retaliation, and she filed this action alleging race discrimination and retaliation. The court found that an employer's refusal to rehire an employee because she filed an EEOC charge against them is direct evidence of retaliation that precludes summary judgment for the employer. Direct evidence is evidence which, if believed, proves the fact without inference or presumption. Direct evidence of discrimination includes statements or documents which show on its face that an improper criterion served as a basis for the adverse employment action. *Dettor v. State of Miss. Veterans Home*, 109 FEP Cases 444, No. 3:09CV395 (S.D. Miss. 2010)

New Legislation

Employers Must Allow Nursing Mothers to Pump Breast Milk

A section of the Patient Protection and Affordable Care Act, signed by President Obama on March 23, 2010 amends the Fair Labor Standards Act to add two new sections for accommodating nursing mothers. Under the Act, employers must provide a

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“reasonable break time” for an employee to express breast milk for a nursing child up to one year after the child’s birth. The breaks must be provided each time that the mother needs to pump the milk. However, the new law does not require employers to pay workers for the break time they use, even though the FLSA treats short breaks as part of work time. In addition, employers must provide a private place, other than a bathroom, that is free from public and coworker intrusion. A company with fewer than 50 workers may be exempt from the requirements but only if the law would impose an “undue hardship” on the employer’s finances and business structure. The health care law does not provide a specific date when the breast feeding regulations take effect, and still must be codified by the U.S. Department of Labor.

DOL Reverses Position on Commissioned Mortgage Loan Officers

On March 24, 2010 the Department of Labor’s Wage and Hour Division issued its first administrator’s interpretation letter wherein it interpreted the Administrative Exemption not to cover loan officers as exempt employees under the Fair Labor Standards Act as had originally been decided. According to the letter, loan officers’ primary duty is to make sales on behalf of their employer, and they are not involved in management or general business operations of their company (requirements of the Administrative Exemption). The latest interpretation officially withdraws a 2006 opinion letter which held that loan officers were exempt administrative employees. After reconsidering its original determination, DOL officials concluded that loan officers receive sales leads from direct mail and marketing, and interview customers about finances. Based on this information, the officers then offer suitable loan packages to clients. The DOL found these primary duties do not involve internal management or regular business operations. DOL Administrator Opinion Letters can be found at www.dol.gov/WHD/opinion/adminIntrprtnFLSA.htm

Intern Paid or Unpaid—Whether Minimum Wage is Required

The Department of Labor issued a new Fact Sheet to assist for-profit employers to determine whether the “intern” they have hired must be paid at least minimum wage and overtime as an employee. The Fact Sheet lays out a test containing six criteria for making that determination. The following six criteria must be applied when making this determination:

1. The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment;
2. The internship experience is for the benefit of the intern;
3. The intern does not displace regular employees, but works under close supervision of existing staff;
4. The employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded;
5. The intern is not necessarily entitled to a job at the conclusion of the internship; and
6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

If all of the factors listed above are met, an employment relationship does not exist under the FLSA, and the Act’s minimum wage and overtime provisions do not apply to the intern. For additional information, follow the link below.
http://www.dol.gov/whd/regs/compliance/whdfs71.pdf

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