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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 you 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.

Workers' Compensation

Florida Supreme Court Defines Unrelated Works Exception to Workers' Compensation Immunity

A crossing guard was hit and killed when two vehicles collided at an intersection where the traffic lights were malfunctioning. The crossing guard's husband initiated a wrongful death case against the county, alleging that the accident was caused in part by the negligence of the county's traffic signal repair personnel who failed to repair the malfunctioning traffic lights. The county claimed the action was barred because the Workers' Compensation Act was the exclusive remedy. Such immunity afforded to the employer also extends to "each employee of the employer when such employee is acting in furtherance of the employer's business." However, this co-employee immunity does not apply to an employee who acts, with respect to a fellow employee, with willful and wanton disregard or

unprovoked physical aggression or with gross negligence when such acts result in injury or death or such acts proximately cause such injury or death, or to **employees of the same employer when each is operating in the furtherance of the employer's business but they are assigned primarily to unrelated works** within private or public employment. If one of these exceptions applies, the injured employee can seek remuneration from a co-employee despite the fact that the injury arose out of the scope of employment.

The crossing guard worked for the county's police department and the traffic repair signal personnel worked for the county's department of public works, each of which are headquartered at different locations. They were not supervised by the same individuals and did not have similar duties. They had no interactions. Common factors used in the analysis of the applicability of the unrelated works exception include: (1) whether the co-employees work at the same location, (2)

whether the co-employees must cooperate as a team to accomplish a specific mission, (3) the size of the employer, (4) whether the co-employees have similar job duties, (5) whether the co-employees have the same supervisor, and (6) whether the co-employees work with the same equipment. The Supreme Court concluded that the phrase “assigned primarily to unrelated works” has both an operation and a location component. Where co-employees are assigned primarily to different departments and different locations, answer to different supervisors, and are assigned primarily to different duties and job functions, they are engaged in unrelated works triggering the exception to workers’ compensation immunity. Therefore, the crossing guard’s wrongful death claim is not barred by workers’ compensation immunity. *Aravena v. Miami-Dade County*, 2006 WL 870503 (Fla. S. Ct. 4/6/06)

Disabilities

Failure of Reasonable Accommodation

A route driver for a beverage bottler was no longer able to drive due to a vision impairment. His supervisor attempted to assist him in finding another position but lacked the authority to offer another job if one was found. The human resources manager did not attempt to find positions available in the company that the former driver could perform. She just determined that the driver’s suggested accommodations were impractical. The court held that the employer failed to engage in good faith interactive discussions with the employee to determine an appropriate accommodation, in violation of the Americans with Disabilities Act. *Canny v. Dr. Pepper/Seven-Up Bottling Group Inc.*, 17 AD Cases 1153 (8th Cir. 3/9/06)

Violence Threats Trump ADA and FMLA Claims

A 30-year employee told the company nurse that when he left the plant, he would be taking a bunch of people with him. He also alluded to having assault weapons and tons of ammunition. The company fired the employee based on his death threats. The employee

sued claiming the company fired him because it wrongly believed he had a mental disability after he learned a supervisor said the employee was paranoid. The court held that the employer’s belief that the employee had made a death threat was a permissible nondiscriminatory reason for his termination, even if the company believed he had a mental condition. “It makes no difference if the employee was in fact guilty of misconduct; as long as the employer discharged the employee because it honestly believed that the employee had engaged in misconduct, then the employer has not discriminated on the basis of disability.” The court also dismissed the FMLA claim because a company psychologist could not determine that the employee had a serious health or mental condition. *Pence v. Tenneco Automotive Operating Co.*, 2006 U.S. App. Lexis 5734 (4th Cir. 3/7/06)

Discrimination

\$9 Million Sexual Harassment Settlement

The U.S. Mint in Denver has agreed to pay close to \$9 million to more than 65 former and current female employees. Thirty-two workers signed an EEOC charge alleging their supervisors demanded sex in exchange for promotions and then harassed them and retaliated against them when they complained. They also alleged that pornography was openly displayed, that they were subjected to unwanted sexual advances by co-workers and managers, and that they were given unfair job assignments. After the EEOC complaint was filed, Treasury Department officials searched the facility for sexist art and graffiti and announced a series of changes including the hiring of an EEO director.

Transgender Bias Case Allowed to Proceed

David Schroer applied for a job at the Library of Congress. He is a retired Army colonel who once headed an elite anti-terrorism unit during his 25-year career in the military. The Library of Congress offered him a job but then withdrew it after he told of his plans to undergo a sex change and become Diane Schroer.

The supervisor withdrew the offer because he did not believe Schroer would be a good fit in the organization. The District Court ruled that Title VII protections also cover transgender people who are discriminated against based on their gender identity. In reaching his ruling, the judge explained that gender may not be a “cut-and-dried matter of chromosomes.”

New York Rangers Cheerleader Prevails in Sexual Harassment Suit

The captain of the New York Rangers cheerleading squad alleged that she was subjected to sexually-charged comments from several Madison Square Garden executives. She also alleged that one of the Rangers’ public relations staff members harassed her after a post-game party, forcibly kissing her and asking her to have sex with him in a bathroom. She was fired after being accused of disparaging several managers by calling them sexual predators. The District Court held that the cheerleader’s allegations provided sufficient evidence of a hostile work environment and that the comments to which she was subjected were insulting, demeaning and objectifying. *Prince v. N.Y. Rangers*

No National Origin Bias Found

Fire department employees of Puerto Rican descent alleged discrimination by the city in

their demotion from exempt community service positions for unsatisfactory job performance. The employees complained that a black public education unit commander created a hostile work environment. However, the Appeals Court ruled that the city had no liability for harassment because the employees never told fire department officials about any specific harassment based on national origin. *Velez v. City of Chicago, 97 FEP Cases 1390 (7th Cir. 4/4/06)*

Family Medical Leave

Discharge Did Not Violate FMLA

An ultrasound technician experienced carpal tunnel syndrome and could not perform the essential functions of her job. The technician’s doctor restricted her to light gripping and no gripping for more than 15 minutes, and her condition did not change during her FMLA leave. Because she could not perform the essential functions of her job at the conclusion of her FMLA leave, the employer terminated the technician’s employment. The court said the FMLA does not require employers to allow employees to remain in positions that they cannot perform. *Bloom v. Metro Heart Group of St. Louis, 11 WH Cases2d 489 (8th Cir. 3/16/06)*

I am pleased to announce that our partner, John E. Moore III has received the prestigious Beverly O’Neill Volunteer of the Year award. At a luncheon on April 20, 2005, John was honored for his extraordinary volunteerism and commitment to improving the lives of Indian River County residents. In 1998, John founded the Holy Cross Catholic Church Service Ministry to channel Holy Cross parishioners’ time, talent and treasure to those in need. The Service Ministry has 200 active members working on projects with Habitat for Humanity, Council on Aging, St. Francis Manor, Salvation Army, Big Brothers/Big Sisters, and the Sneaker Exchange. John is an estate planning attorney and a founding member of Rossway Moore & Taylor. In addition to volunteering with the Service Ministry, he has found the time and energy to hold positions with the Indian River County Hospital District, the Affordable Housing Advisory Commission to Indian River County, the United Way of Indian River County, the Education Foundation of Indian River County, the Riverside Theatre, the Visiting Nurse Association/Hospice of the Treasure Coast, the Indian River Memorial Hospital Foundation, and the Vero Beach Museum of the Arts.