
ROSSWAY MOORE & TAYLOR

ATTORNEYS AND COUNSELORS AT LAW

THE OAK POINT PROFESSIONAL CENTER
5070 NORTH HIGHWAY A-1-A, Suite 200
VERO BEACH, FLORIDA 32963
TELEPHONE (772) 231-4440 FACSIMILE (772) 231-5155
Web site: www.verobeachlawyers.com

TIFFANY GRIFFETH
SHANNON BANITT
LOUIS LUPIN
KELLI SALO

MICHAEL J. SWAN
Of Counsel

CHARLES W. McKINNON
JOHN E. MOORE, III*
BRADLEY W. ROSSWAY
HELEN E. SCOTT
JAMES A. TAYLOR, III*
THOMAS W. TIERNEY**

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*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.

Discrimination Claims Settled

Sexual Harassment

Fox News has agreed to pay \$225,000 to settle allegations by the Equal Employment Opportunity Commission that women in its employ were subject to a hostile work environment. In addition, Fox agreed to enhance its anti-discrimination efforts. The lawsuit alleged that a Fox vice president routinely used obscenities and vulgarities with women employees that he did not use with male employees and used gross obscenities and vulgarities when describing women and their anatomy. He allegedly routinely cursed at and otherwise denigrated women employees and treated them in a demeaning way. The lawsuit also alleged that Fox News relegated women to lower work status than male counterparts. Fox admits no liability but said it settled the case to put it behind them. *EEOC v. Fox News*

Network, No. 05-9419, consent decree (S.D. N.Y. 7/31/06)

Hiring Discrimination

McCormick & Company, Inc. in Irving, Texas has agreed to pay \$300,000 to settle claims of hiring discrimination. The charges stem from a Department of Labor compliance review of the facility conducted in 2002 and 2003 which found the company had engaged in hiring discrimination against females applying for production worker positions. The positions typically involve lifting 50 pound bags of spices and dumping the contents into large mixers continuously over an eight hour period. McCormick fills these positions through temporary hires and pays the workers \$10.00 to \$10.50 per hour. McCormick expressly denied any wrongdoing or violation of anyone's rights. However, they have agreed to hire 27 class

members into production worker positions, immediately correct any discriminatory practices, undertake extensive self-monitoring measures for six months to ensure that all hiring practices fully comply with the law, and ensure compliance with Executive Order 11246 recordkeeping requirements. The OFCCP, an agency of the Department of Labor's Employment Standards Administration, enforces Executive Order 11246 and other laws that ensure equal employment opportunities for all employees of federal contractors.

Fair Labor Standards Act

Sears, Roebuck and Company will pay \$15,000,000 to settle class actions on behalf of in-home appliance repair technicians. The technicians were required to download daily work assignments from home before proceeding to their first assignment and were not paid for the time downloading or the time commuting to the first assignment. *Lenahan v. Sears, Roebuck & Company*, 11 WH Cases2d 1214 (D. NJ 7/24/06). Normally commuting time is not compensable. However, in this case, the employees started their work day at home downloading their schedules. Travel time after the employee begins work but before the commute home is compensable.

Family & Medical Leave Act

Violation of Employer's Leave Procedures Does Not Justify FMLA Denial

A welder was denied an extension of her medical leave because she failed to follow her employer's procedures to put leave requests in writing. The Sixth Circuit ruled that the employer violated the FMLA when it fired the welder because her request satisfied FMLA requirements. The Court held that the manufacturer may establish notice and procedural requirements for requesting leave but an employee's failure to follow internal procedures does not permit the employer to deny or delay FMLA leave.

The court found that the manufacturer interfered with the plaintiff's FMLA rights by denying her extension of medical leave. *Killian v. Yorozu Automotive Tenn.*, 454 F.3d 549 (6th Cir. 7/20/06)

Six Days to Provide Doctor Certification Insufficient

An employee informed his employer that he was suffering from blurred vision, extreme headaches, and was passing out and needed to take some time off. The employer advised that he had six days to provide medical certification of his need for leave. When he did not comply, he was discharged. The Court held that the employer had sufficient notice that the leave requested was FMLA leave, even though the employee did not expressly request it based on the symptoms and the fact that the employer was already aware of the employee's history of medical problems. The FMLA allows an employee 15 days to respond to a request for medical certification and six days was insufficient. *Cooper v. Fulton County, Georgia*, 11 WH Cases2d 1185 (11th Cir. 8/7/06)

New Legislation

President Bush Signed Pension Protection Act

On August 17, 2006, President Bush signed into law the Pension Protection Act. The Act establishes an age discrimination standard for cash balance pension plans. This means, employers who establish cash balance plans in the future can have legal certainty that a new cash balance plan is not age discriminatory. While new requirements for conversions to cash balance plans are added, companies will be able to weigh the costs of those additional requirements against the benefits of adopting a new cash balance plan. Among other things, it is intended to protect the benefits older workers receive as early retirement incentives from being eroded when a company converts from

traditional defined benefit plans to cash balance defined benefit plans. The Act requires pensions to be fully funded by 2015 and prevents companies with pension deficits from skipping annual contributions while representing their plans as healthy. Airlines get more time than others to meet their obligations. A goal of the Act was to shore up the health of the Pension Benefit Guaranty Corporation which assumes terminated plans and pays reduced benefits to retirees.

Fair Labor Standards Act

Hospital Responsible for Overtime As Co-Employer of Nursing Aide

A certified nursing aide was signed up through three staffing agencies for work at a New York hospital. She accumulated more than 40 hours of work per week but was not paid overtime. A federal district court in New York ruled that the hospital as a joint employer with the staffing agencies was responsible for paying the employee's overtime. The economic reality of the relationship showed that the hospital exercised functional control over the nursing aide. Because there had been no effort by the hospital to determine whether its actions complied with the FLSA, the nursing aide was awarded not only back overtime wages but also an equal amount in liquidated

damages authorized by the Act. *Barfield v. NYC Health & Hospitals Corp.*, 11 WH Cases2d 1041 (S.D. NY 6/2/06)

Miscellaneous

Verification Defense Waived

A discrimination charge filed with the Equal Employment Opportunity Commission was not verified (signed under penalty of perjury or notarized). The EEOC charge form requires the charging party's signature under the pre-printed statement, "I hereby verify that the statements contained in this complaint are true and correct to the best of my knowledge, information and belief." The Court found that neither the EEOC charge nor intake questionnaires signed by the employee's attorney satisfied the verification requirement. The employer filed a response to the charge, and the employee received a right to sue effectively eliminating her ability to amend the form. The employee then filed a lawsuit and for the first time, the employer raise the defect in a motion to dismiss. The court ruled that the verification requirement is not jurisdictional and is subject the waiver. Because the employer did not immediately object at or before responding to the EEOC charge, it waived its defense. *Buck v. Hampton Township School District*, 18 AD Cases 113 (3d Cir. 6/30/06)