
ROSSWAY MOORE & TAYLOR

ATTORNEYS AND COUNSELORS AT LAW

JOHN E. MOORE, III*
BRADLEY W. ROSSWAY
HELEN E. SCOTT
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) 231-5155
Web site: www.verobeachlawyers.com

SHANNON BANITT
TIFFANY GRIFFETH
LOUIS LUPIN
DEBORAH MARTIN-LEE
VENKATA PATURI

MICHAEL J. SWAN
Of Counsel

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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

Harassment Policy Saves the Day

An employer was found not to be liable for alleged sexual harassment by a supervisory employee because the employer had a comprehensive anti-harassment policy which it distributed to employees and effectively enforced. The policy requires employees who believe they were being harassed to report the harassment to specified individuals. The court found that the company could not be held liable when an individual failed to report the behavior to someone specified in the policy. Further, allegations that the supervisor was simultaneously harassing multiple individuals did not give the employer constructive notice of the harassment since the employer had in place a widely-disseminated written anti-harassment policy

that was both comprehensive and vigorously enforced. The employer was entitled to the affirmative defenses set forth in *Farragher v. Boca Raton* (S. Ct. 1998) when the complaining employees unreasonably failed to take advantage of any preventive or corrective opportunities to eliminate the unwanted conduct. *Minix v. Jeld-Wen Inc.*, No. 06-16094 (11th Cir. 6/27/07)

Trade Secrets

Stealing Employer's Clients Not Violation of CFAA

The Computer Fraud and Abuse Act prohibits unauthorized access to computers and confidential data. An accountant used his computer to copy information about his employer's clients and shared that information with his new employer. A District

Court judge in Pennsylvania held that his conduct was not a violation of the CFAA because the employer must show an unauthorized procurement or alteration of information on a computer system. In this case, the accountant was still employed when the conduct occurred and had full access to the employer's system. The court found that the conduct may have been a breach of the accountant's fiduciary duty of loyalty based on evidence that he solicited clients while he still worked for the employer some of which followed him to his new employer. *Brett Senior & Associates v. Fitzgerald*, No. 06-1412 (E.D. Pa. 7/13/07) A Federal District Court judge in Florida also held in a similar case that there was no unauthorized access or alteration of information copied to benefit a new employer because the conduct occurred while the individuals were still employed and were permitted full access to the company's computers. It may be prudent for employers to adopt policies prohibiting the use of the company's computer system to access trade secrets for any reason other than to benefit the employer.

FMLA and FLSA

Rate of Pay for Light Duty Assignment

A bus driver injured on the job returned to work in a light duty assignment. The employer paid her \$3.23/hour less to do office work than it paid her to drive a bus. The employee alleged that because she substituted light duty work in lieu of traditional Family & Medical Leave Act leave, she was entitled to her full salary because the FMLA requires her to be returned to the same position and rate of pay upon return from leave. The Court of Appeals disagreed saying that neither the FMLA nor its regulations address the rate of pay an employee must receive on light duty. That matter is covered by workers' compensation and not the FMLA or the Fair Labor Standards Act. The FMLA requires an

employee to be returned to the same or equivalent job and pay only if the employee is able to perform the essential functions of the job but she was not able to drive a bus with her injury. *Hendricks v. Compass Group USA Inc.*, No. 06-3637 (7th Cir. 8/6/07)

Proposed Legislation

Social Security No-Match Letters

On August 10, 2007 the Department of Homeland Security (DHS) implemented new rules regarding Social Security No-Match Letters. Under the regulations, new specific legal obligations are imposed on employers that receive the so-called "no-match" letter from the Social Security Administration (SSA). A no-match letter may be issued when an employee's social security number does not match the employee's name in the SSA database. The rule permits employers to take specific steps under the "safe-harbor" procedures to protect against the DHS using the no-match letter as evidence that the employer has constructive knowledge of employing an illegal worker. To be eligible for "safe harbor" under the regulations, an employer must take action within 30 days of receipt of the no-match letter by either correcting clerical errors or requesting the employee to correct the error directly with the SSA or DHS. In the event that the discrepancy cannot be clarified within 90 days, the employer must then choose between terminating the employee or face the risk that DHS will determine they have constructive knowledge of employing an illegal worker.

However, on August 31, 2007, a federal judge in San Francisco blocked the Bush administration from imposing the rule. U.S. District Judge Maxine Chesney granted a nationwide temporary restraining order sought by the AFL-CIO and affiliated unions to keep the government from sending letters to employers demanding that they clear up

workers' citizenship status. The order will be in effect until October 1, when another federal judge will consider whether to grant an injunction that would block the rule until a trial on the unions' lawsuit against the government is held.

Equal Remedies Act of 2007 (S. 1928)

Senator Edward Kennedy introduced legislation that would repeal the caps on damages added by the Civil Rights Act of 1991. The Act currently limits compensatory and punitive damages in discrimination cases under Title VII and the Americans with Disabilities Act to between \$50,000 and \$300,000 depending on the size of the employer. Senator Kennedy cited perceived inequities between the damages limit contained in the Civil Rights Act of 1991 and damages that can be recovered based on race or national origin brought under the Civil War era civil rights statute §1981 as a reason for the bill. The proposed legislation is being praised by advocacy groups for women.

Ledbetter Fair Pay Act (H.R. 2831)

On July 31, 2007, the House of Representatives passed the Ledbetter Fair Pay Act in an attempt to reverse a U.S. Supreme Court decision that limits the time workers have to file claims against employers for pay discrimination. The Court essentially held that a pay decision made years earlier did not create a continuing violation of Title VII and could not support a lawsuit filed now because it was untimely. The bill will have a tougher time passing the Senate and the President has indicated he would veto the legislation.

Proposed Amendments to Americans with Disabilities Act

Bills have been introduced in both Houses of Congress to amend the ADA. Critics say the courts have narrowly interpreted the ADA limiting its scope and undermining its intent. The House bill (the ADA Restoration Act H.R. 3195) would amend the definition of disability and it would prevent courts from considering mitigating measures such as eyeglasses or medication when determining whether a person qualifies for protection under the law. The Senate bill is similar (S. 1881). Both bills are still in committee.