
**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

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

TIFFANY GRIFFETH
SHANNON BANITT
KELLI SALO

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HELEN E. SCOTT, P.A.
MICHAEL J. SWAN
Of Counsel

*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 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 a substitute for legal advice.

Discrimination

Cashier's Retaliation Claim Denied

The work hours of a part-time cashier were reduced several weeks after she reported that her general manager was harassing her. The court agreed that a reduction in take home pay is a tangible employment action but held that the cashier failed to show that the reduction in hours was connected to her harassment complaint. In fact her hours were increased before the Christmas holiday then reduced again after the holiday. She was told at the time of her hire she would be rescheduled after Christmas. *Cotton v. Cracker Barrel Old Country Store*, 97 FEP 193 (11th Cir. 1/4/06)

Vague Allegations of Retaliation Insufficient

An employee alleged that he was discharged in retaliation for filing a claim with the Equal

Employment Opportunity Commission. He alleged that his civil rights were violated but did not specify that the alleged discrimination was based on race, color, sex, religion or national origin. The court said that a general complaint of unfair treatment does not translate into a charge of illegal discrimination or retaliation. *Slagle v. County of Clarion*, 97 FEP Cases 386 (3rd Cir. 1/12/06)

Refusal to Accommodate Lifting Restrictions Not Pregnancy Discrimination

A customer service agent for AirTran Airways became pregnant. During her third month, the employee's doctor restricted her to lifting no more than 30 pounds as a precautionary measure. The employee's job description required her to lift 70 pounds repeatedly during her job. The employer placed the employee on unpaid Family & Medical Leave, holding her job open for over

ten months. When she received clearance from her doctor, the employer immediately restored her to her former position. The employee sued anyway claiming pregnancy discrimination for placing her on leave when she was willing and able to perform parts of her job. Relying on the employee's job description and the fact that there was no evidence that customer service agents did not regularly lift up to 70 pounds, the judge found that the employee was no longer qualified to work as a customer service agent. Further, it found the company was not obligated to accommodate the employee by reassigning her. The employee pointed to three people who had been injured on the job and were accommodated for a short period of time. The judge disregarded them as not being similarly situated because their accommodation was for a couple of weeks or a month and the employee was requesting to be accommodated for six months. *McQueen v. AirTran Airways, Inc.*, 2005 WL 3591100 (N.D. Fla. 12/30/05)

Disability

Employer Not Required to Provide Accommodation for Employee's Hugging or Lifting Limitations

An employee with an elbow injury claimed he was unable to hug his wife as tightly as he could before his injury and sought a reasonable accommodation from his employer. The court pointed out that any accommodation required by the Americans with Disabilities Act must relate to the disability, and the employee was not required to hug his wife as part of his job. The employee also alleged that he had a lifting restriction of 40 pounds. Lifting, the court said, is part of a set of basic motor functions that together represent a major life activity. While lifting may be a major life activity, restrictions on lifting will not be enough to establish a disability. *Nuzum v. Ozark Auto Distributors, Inc.*, 17 AD Cases 688 (8th Cir. 12/27/05)

Major Life Activity of Working and/or Thinking

A breast cancer survivor with short-term memory loss from chemotherapy was passed over for retention. A jury found that the company mistakenly considered the employee as disabled in violation of the Americans with Disabilities Act. The employee had superior past performance and was rated at the top of a list of management employees to be retained in a reorganization. When the company learned the employee had concerns about traveling to two of its plants farther from her home, it dropped the employee to the bottom of a list. *Eshelman v. Agere Systems, Inc.*, No. 03-CV-1814 (E.D. Pa. 10/19/05)

FMLA

Employee's Multiple Violations of Leave Policy Justified Discharge

Honda of America was justified when it discharged an employee who was on Family & Medical Leave. The discharge was based on the employee's failure to return a medical certification form within 15 days requested by the employer and multiple violations of the company's leave policies. For six months prior to his leave, he had been repeatedly notified in writing of Honda's requirement to provide medical certification of his need for leave. *Frazier v. Honda of America Manufacturing*, 11 WH Cases 2d 133 (6th Cir. 12/22/05) **Note:** This case does not give employers the absolute right to terminate an employee on FMLA for not returning a medical certification within 15 days. As the case points out, the request had been made months before the employee's leave. A court will look at whether an employer has been fair in its treatment of an employee.

Miscellaneous

Employer May be Liable for Employee's Child Pornography

A New Jersey employer failed to take action when it suspected an employee was accessing child pornography web sites on his office computer. The employee acted in a secretive manner when coworkers and his supervisor passed within view of his computer. The network log of web sites he visited contained numerous sexually suggestive names. Still, the employer did not investigate further or take disciplinary action for the employee's misuse of his computer until after pornographic pictures of his stepdaughter were discovered in the trash bin. The court held that the employer had a duty to protect the public from the employee's actions, even without the specific knowledge of the threat to the stepdaughter. *Doe v. XYZ Corp.*, 23 IER Cases 1549 (N.J. Super. Ct. 12/27/05)

Travel Time to Doctor's Visit Compensable

An employee who stormed off the job, angry at having to cover a sick co-worker's shift was required to attend psychotherapy sessions. She demanded compensation under the Fair Labor Standards Act to cover time spent traveling to and from the sessions as well as the time spent in psychotherapy. The employer refused to let the employee see her own therapist, and it paid for most of her counseling. The court ruled that the employee was entitled to be compensated for the regular and overtime hours spent traveling to and from the sessions as well as

the time spent in counseling, because the counseling was primarily for the benefit of the employer. *Shie v. City of Aurora*, No. 04-2308 (7th Cir. 12/27/05)

Polygraph Protection Act

The Drummond Company had eyewitness testimony that certain employees were stealing or having someone else steal company property that was readily accessible to them. They conducted an investigation resulting in the employees being discharged. The union proposed to the employer that the discharged employees be given an opportunity to take a polygraph to prove their innocence. The employer agreed but the employees refused to take the polygraph exams. They sued the employer alleging a violation of the Polygraph Protection Act. The court of Appeals for the Eleventh Circuit ruled that the proposal was made by the employees' agent to benefit them and there was no evidence that the employer influenced the union in any way. Furthermore, the company established that it had reasonable suspicion that the employees were stealing and were giving the employees an opportunity to prove their innocence in an ongoing investigation. No violation of the PPA was found. *Watson v. Drummond Co.*, 23 IER Cases 1682 (11th Cir. 1/20/06)