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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 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.

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Discrimination

Applicant's Lack of Qualifications Not a Defense

A female job applicant was rejected twice for a job that was later filled by men. The female was told she did not meet the qualifications. However, neither did the men. The court found that the female applicant's lack of qualifications for the job was not a defense to rejecting her since the decision to hire men who similarly lacked the stated qualifications created different qualifications for the job. *Scheidemantle v. Slippery Rock University,* 99 FEP Cases 673 (3d Cir. 12/19/06)

Mistaken Belief Not Discrimination

A licensed practical nurse alleged she was fired because of her race. The employer defended that she was fired because it believed she verbally abused a nursing home resident. The nurse failed to establish that her employer's explanation was pretextual even if the employer had been mistaken because she failed to offer any evidence that racial animus motivated the decision. The court said that the nurse could not establish pretext merely by showing that her discharge was based upon a mistaken belief. *Arnold v. Nursing and Rehabilitation Center at Good Shepherd, LLC,* 99 FEP Cases 586 (8th Cir. 12/8/06)

$2.25 Million Jury Award

A federal jury in Atlanta awarded $2.25 million to the former controller of a restaurant and sports bar based on racial and sexual harassment by the restaurant chain's chairman. The controller alleged that the chairman made continuing hostile comments about her romantic relationship with a black man and discharged her in retaliation for complaining. The controller brought a Title VII suit based on race and

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sex, an Equal Pay Act claim, and state law claims for intentional infliction of emotional harm and negligent retention. The jury agreed with her finding the chairman personally liable for $250,000 in compensatory damages and $750,000 in punitive damages for intentional infliction of emotional harm against the controller. The restaurant chain was found liable for $250,000 in compensatory damages and $750,000 in punitive damages on the emotional distress claim, $50,000 in compensatory damages and $200,000 in punitive damages based on the employer's continued retention of the chairman when it was reasonably foreseeable from his propensities that he could cause the type of harm sustained by the controller. *Tomczyk v. Jocks & Jills Restaurants,* No. 1:00-CV-3417 (N.D. Ga. 11/30/06)

Appearance Policy Upheld

The Kentucky Parks Department adopted an appearance policy requiring employees to tuck in their shirts and also banned visible tattoos and body piercings. Three seasonal employees decided to protest the policy and refused to tuck in their shirts. They were terminated and sued the employer alleging violation of their First Amendment rights. One of the employees also alleged that he was terminated for his U.S. Navy tattoo. The court dismissed the plaintiff's claims finding that untucked shirts do not amount to speech on a matter of public concern. The USN tattoo was a closer call, but the court said that the employee's refusal to comply with the dress code provided sufficient independent reason for the discharge and did not decide the tattoo question. *Roberts v. Ward,* No. 05-6305 (6th Cir. 11/27/06)

Proposed Legislation

Democrats' Agenda

Employers can expect some changes in the laws affecting the employer-employee relationship. Following is some of the legislation proposed by Democrats.

Minimum Wage: Democrats' have vowed to pass a minimum wage increase to $7.25 per hour in three phases. President Bush has signaled that he will support an increase of $2.10 per hour from the current $5.15 to be completed within two years but wants any legislation to include protections to ensure that a wage increase does not adversely affect smaller businesses. Florida's state minimum wage effective January 1, 2007 is $6.67 per hour, adjusted annually for inflation. If any provision of the Fair Labor Standards Act is more favorable to employees than a comparable provision in a state law, employers must follow the FLSA. Therefore, if the federal minimum wage increases to $7.25 before Florida's state minimum wage reaches that point, employers in Florida subject to the FLSA would have to pay the higher amount.

Paid Sick Leave: Senator Edward Kennedy plans to introduce legislation guaranteeing all working Americans seven (7) paid sick days per year to use for their own or a family member's medical needs (the Healthy Families Act). Since the passage of the Family & Medical Leave Act, Senator Kennedy has tried to garner support to expand the FMLA to smaller employers and to require employees to be paid for the time off.

Health Care: Another proposal from Senator Kennedy is the Medicare for All legislation which he claims is the starting point for achieving universal health care coverage.

Family & Medical Leave Act Public Comment Requested

As a result of the 2002 Supreme Court decision in *Ragsdale v. Wolverine World Wide,* the Department of Labor has called for public comment on whether the FMLA guidelines should be changed in terms of

how the Act is administered. The *Ragsdale* court found that the agency had exceeded its authority in penalizing employers when they failed to properly designate an employee's leave as FMLA leave. To comment on the Proposed Rule: "Request for Information on the Family and Medical Leave Act of 1993," 71 Fed. Reg. 69504 (Dec. 1, 2006) go to www.gpoaccess.gov/fr/.

Disability

Putting Employee On Leave Not ADA Breach

An employee had multiple sclerosis and had difficulty keeping up with a heavy travel schedule, driving and meetings. The company accommodated him with a motorized scooter, a home office, and other equipment. It also offered him jobs with equal pay and less travel, which he declined. Eventually, other employees complained that his assistant had to drive him to meetings, that he missed meetings, and that he crashed a scooter in the parking lot. The employer arranged for the employee's examination by an occupational physician who found the employee had vision and mobility problems. The employer found it had no jobs for the employee that did not involve travel and driving so it placed him on disability leave with full pay and benefits. The employee filed suit alleging disparate treatment under the Americans with Disabilities Act. The trial court granted summary judgment to the employer and the appeals court upheld the trial court. The appellate court ruled that the employee's claim failed under the ADA because he was not meeting the employer's legitimate expectations for performance and did not produce evidence that the employer terminated him for discriminatory reasons. *Timmons v. General Motors Corp.,* No. 05-3258 (7th Cir. 12/7/06)

UPS Paid $100,000 to Settle ADA Claim

A long time employee with a degenerative eye condition worked as a sorter/loader in the UPS facility in Horsham, PA. When a new supervisor complained about the employee's retinitis pigmentosa and alleged the employee was a direct safety threat to himself and to others, the employee was suspended and required to provide medical documentation regarding his condition. The EEOC charged that UPS fired the employee based on a conclusion regarding the impact of his disability that the company reached without supporting factual or objective medical evidence in violation of the Americans with Disabilities Act. UPS agreed under the settlement to pay the employee $100,000 to resolve his claims. *EEOC v. United Parcel Services, Inc.,* No. 06-CV-1971 (consent decree 12/5/06)