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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*

**Supreme Court Clarifies Retaliation**

Ms. White, a railroad employee, alleged that her employer retaliated against her for complaining about her supervisor's sexual harassment when it reassigned her from forklift duty to standard track laborer tasks and suspended her without pay before reinstating her. The Court determined that the anti-retaliation provision of Title VII, 42 USC §2000e-3(a) unlike the substantive provision of Title VII was not limited to discriminatory actions that affected the terms and conditions of employment and should not parallel the Title VII discrimination provisions. **An employer can effectively retaliate against an employee by taking actions not directly related to her employment or by causing her harm outside the workplace. The employee just needed to show that a reasonable employee would have found the challenged action materially adverse.**

The Court found that there was a sufficient evidentiary basis to support the jury's verdict because a jury could reasonably conclude that the reassignment of responsibilities would have been materially adverse to a reasonable employee, even though Ms. White's former and present duties fell within the same job description, and because it was reasonable for the jury to conclude that the 37-day suspension without pay was materially adverse, even though the suspension had been rescinded. The justices said, "we also conclude that the provision covers those (and only those) employer actions that would have been materially adverse to a reasonable employee or job applicant. In the present context that means that the employer's actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination... The significance of any given act of retaliation will often depend upon the

particular circumstances.” This ruling will also expand the definition of retaliation under the Americans with Disabilities Act since the retaliation provisions of Title VII and the ADA are similar. *Burlington Northern and Santa Fe Railway Co. v. White*, 2006 U.S. Lexis 4895, 98 FEP Cases 385 (U.S. 6/22/06)

#### *Disability Discrimination*

#### **Independent Contractor with Disability Not Protected**

An independent contractor at a hospital suffered from bipolar disorder. When he was ready to return from a leave of absence for treatment, his return was permitted with certain conditions outlined in a letter agreement. When he was subsequently terminated, the contractor alleged discrimination based on his disability. The Eighth Circuit Court of Appeals held that neither the ADA nor Section 504 of the Rehabilitation Act of 1973 extend protection to independent contractors. *Wojewski v. Rapid City Regional Hospital, Inc.* 450 F.3d 338 (8<sup>th</sup> Cir. 6/9/06)

#### *Fair Labor Standards Act*

#### **Slavery is Still Illegal**

An Oklahoma court found that a company lured 52 laborers from India under false pretenses and then subjected them to underpayment of minimum wage and overtime, substandard living conditions, food rationing, lock-downs with armed guards, inadequate medical assistance, humiliating and demeaning working conditions and restrictions in religious practices. The court awarded \$1.24 million to the men finding that (1) the aliens were employees under the Fair Labor Standards Act; (2) the corporation violated the FLSA, 42 USC §1981 and Title VII 42 USC §2000e-2 by paying the aliens less than the minimum wage and subjecting them to hostile, degrading working conditions; (3) the corporation committed deceit, false imprisonment, and intentional infliction of emotional distress; and (4) the president of the corporation was personally liable for injuries the aliens suffered because he personally acted to recruit the workers and was

personally involved in many of the decisions that resulted in the underpayment of minimum wage and overtime pay. *Chellen v. John Pickle Co.*, 2006 U.S. Dist. LEXIS 35557, 11 Wage & Hour Cases2d 921 (N.D. Okla. 5/24/06)

#### **On Call Not Compensable Where Workers Have Freedom of Movement**

An airport authority’s rules require its police officers to carry pagers at all times so they can be available to respond to emergencies during their off-duty hours. The officers sued for unpaid overtime compensation for all time they were required to carry the pagers. The court held that the airport authority was not required to pay the police officers overtime while on call because the officers were not precluded from using their off-duty time effectively for personal activities. *Adair v. Charter County of Wayne*, 11 WH Cases2d 985 (6<sup>th</sup> Cir. 6/22/06)

#### *Family & Medical Leave*

#### **No Duty to Treat Absence as FMLA**

An employee was discharged after she exceeded the number of absences permitted by the employer’s attendance policy. She claimed that her last absence should have been considered Family & Medical Leave Act qualified because she told the employer that she was sick and had consulted a physician, and that she would be unable to work for three days. The court said that was too vague to alert the company that her absence qualified for FMLA protection. The FMLA regulations require the employee to establish a serious-health condition defined as lasting three or more days and either treatment by a physician on two or more occasions or a regimen from the health care provider providing for ongoing treatment. The employee had provided notice of only one consultation with a physician, not two and her absence was not FMLA qualifying. The employer had no duty to treat the three-day absence as a qualifying FMLA absence. *Phillips v. Quebecor World RAI, Inc.*, 450 F.3d 308 (7<sup>th</sup> Cir. 6/12/06)

### **Successor Employer Subject to FMLA**

A truck driver drove a route under a postal service contract. When a different company was awarded the postal contract, the employee was hired by that new company and continued his same route. The employee alleged he was fired by his employer in violation of the FMLA even though he worked for the company for only six months. The Court of Appeals held that the truck driver was indeed FMLA eligible because his employer was the successor in interest to the driver's previous employer. The court found that a merger or transfer of assets between the two companies does not have to be found before the court can impose successor liability. The amount of time the driver worked for the prior employer should have been added to the time he worked for the successor employer, making him eligible for FMLA leave. *Cobb v. Contract Transport Inc.*, 2006 U.S. App. LEXIS 16178 (6<sup>th</sup> Cir. 6/28/06)

*Miscellaneous*

### **ICE Seeking Access to Social Security Mismatch Data**

The Social Security Administration sent about 128,000 letters to employers last year informing them of mismatched information. The SSA said

it sends no-match letters to employers whose mismatched data represents more than one-half (1/2%) percent of their workforce and more than ten workers. Immigration and Customs Enforcement is requesting full access to that information. Currently, they can only access SSA information on mismatched social security numbers if they are already prosecuting a company for employing undocumented workers. If ICE could identify companies with high no-match rates, the agency could then target them for possible enforcement actions. The U.S. Senate is currently hearing testimony on this subject. Employers who have received a no-match letter from the SSA need to watch this legislation closely.

### **EEOC Guidance Issued**

The EEOC has issued new guidance on race and color discrimination in the workplace and a fact sheet on hearing impairments in the workplace. The race and color guidance points out that even African Americans can discriminate against each other if they base a decision on the color of their skin; i.e., lighter or darker than their own. The guidance may be found at [www.eeoc.gov/policy/docs/race-color.html](http://www.eeoc.gov/policy/docs/race-color.html). The hearing impairment fact sheet dated July 26, 2006 may also be found on the EEOC web site.