
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) 231-4430
Web site: www.verobeachlawyers.com

SHANNON BANITT
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.

Contracts

Right to Jury Trial May Legally be Waived

Employers frequently ask whether they should require employees to arbitrate any lawsuits they may have against the employer. While arbitration may be possible, it is not the only alternative to avoid a jury trial. Employers and employees may legally agree to waive their right to a jury trial and have any employment disputes heard by a judge. In a recent case in the Middle District Court of Florida, the judge denied the former employee's demand for a jury trial in her Title VII, Florida Civil Rights Act, and Equal Pay Act lawsuit based on an agreement in her employment agreement to waive her 7th Amendment right to trial by jury. The Court stated that as long as the agreement was knowing and voluntary, it would be upheld. Factors a court may consider in making this determination include: 1) the conspicuousness of the waiver provision; 2) the parties relative bargaining power; 3) the sophistication of the party challenging the

waiver; and 4) whether the terms of the contract were negotiable. The Court said it was not whether any particular number of factors has been satisfied but whether, in light of all the circumstances, the Court finds the waiver to be unconscionable, contrary to public policy or simply unfair. In this case, the waiver was drafted to apply to both the employer and the employee, was written in clear unambiguous language, was conspicuously set forth in a separate paragraph with the title "Waiver of Jury Trial" underlined, and was located near the end of the document. In addition, the employee was an experienced business person who could have requested the opportunity to have the agreement reviewed by legal counsel and requested an opportunity to negotiate its terms. The former employee did none of these things. Further, the judge held that duress is not a valid defense to a contract if the moving party had an alternative to signing the agreement such as to remain in a current position rather than resign. Haste in reviewing and signing a contract is likewise insufficient to invalidate a contract and

insufficient to show that the waiver was not made knowing and voluntary. *Winiarski v. Brown & Brown, Inc.*, 2008 U.S. Dist. Lexis 35799 (M.D. Fla. 2008)

Discrimination

Refusal of Remedies in Sexual Harassment Case Establishes Affirmative Defense

An employee alleged that she was harassed by her immediate supervisor who was preoccupied with sex talk and made persistent unwelcome advances. The employee took a leave of absence and two months later while still on leave, complained for the first time of the harassment. The employer investigated and could not substantiate any harassment. However, it offered her a different position reporting to another supervisor effectively remedying the problem. The employee still refused to return to work and after sixteen months the employer terminated her employment. The court concluded that the record did not substantiate the employee's argument that she did not return to work because she was unable to do so. Further, the employer's policy was facially effective and the employer undertook prompt investigatory measures permitting the employer to establish its affirmative defense to the allegations of sexual harassment. *Thornton v. Federal Express Corp.*, No. 07-5116 (6th Cir. 2008)

Race Discrimination Applicable to Small Employers

Last month we reported the U.S. Supreme Court's decision in *CBOCS West, Inc. v. Humphries*, No. 06-1431 (2008). The case held that an employee could have a viable retaliation case under §1981. Section 1981 is a civil war era statute that prohibits race discrimination and applies to employers of all sizes. This decision is important in that it expands the protections available to plaintiffs

to include retaliation. It also serves as a good reminder that even small employers with fewer than 15 employees can be subject to race and retaliation claims. Under Title VII of the Civil Rights Act and the Florida Civil Rights Act, employees must first file an administrative charge before they can sue, and they have only 300 days to file that administrative charge. If no charge has been filed within 300 days, employers have generally felt confident that there would be no lawsuit. If race is the issue, however, the employer's confidence is misplaced because §1981 has a four-year statute of limitations and no administrative remedies to exhaust. Employers must adopt a policy of maintaining personnel records for at least four years to cover this longer statute of limitations. An employer would have difficulty defending a §1981 race or retaliation suite if the employee waits three years and 11 months to file a lawsuit and the files have been discarded.

Abortion Protected by PDA

The Pregnancy Discrimination Act protects employees who are pregnant and have related medical conditions from employment discrimination. On the advice of her doctor, Jane Doe terminated her pregnancy. Her employer fired her three days after the surgery when she failed to call in sick every day while recovering from the procedure. The court relied on the legislative history of the act which stated this "language covers women who choose to terminate their pregnancies." There was evidence in this case that other employees who missed work due to illness were not required to call in every day. Her supervisor also remarked that Doe got rid of her baby because she did not want to take responsibility, and he fired her the day her baby was buried, three working days after the surgery. The court found sufficient evidence to raise an inference of discrimination and for a jury to conclude that the employer's reason was pretextual. *Doe v. C.A.R.S. Prot. Plus, Inc.*, 527 F.3d 358 (3d Cir. 2008)

Disability Discrimination

Employer has Duty to Reasonably Accommodate Disability in Absence of Request

Wal-Mart involuntarily transferred a worker with cerebral palsy from pharmacy aide to parking lot duty, a less desirable position. The employee was not offered job training or coaching. The Court held that even though the employee did not request any type of accommodation, Wal-Mart had an obligation to engage in an interactive process regarding accommodation because the worker's disability was obvious and known to Wal-Mart. *Brady v. Wal-Mart Stores, Inc.*, No. 06-5486 (2d Cir. 2008)

Duty to Accommodate Continues If First Attempt Unsuccessful

A postal service employee had orthopedic injuries, asthma and dust allergies. The employee requested reasonable accommodations. The postal service concluded after one attempt to accommodate her was unsuccessful that she was unemployable. The employee suggested numerous suitable positions within the agency that she could perform. The postal service argued that employees work in "crafts" and accommodations are not awarded outside the craft. They also had a policy not to transfer employees as a reasonable accommodation. The court concluded that once an

accommodation has been attempted, the duty to accommodate continues and is not exhausted by one effort. *Fowler v. Potter*, No. C 06-04716 SBA (N.D. Cal. 2008)

Stroke Victim May Pursue Discrimination Claim

An electrician who suffered a stroke in 1999 was demoted in 2003 because his employer feared he could not safely perform his job. A lower court granted summary judgment to the employer but the Tenth Circuit Court of Appeals reversed finding a reasonable jury could find the employer regarded the electrician as disabled. The employee had worked for three years after the stroke before the plant manager demoted him because he believed the employee could no longer work safely as an electrician. The company contended that, at most, it regarded the electrician as unable to perform the single job of electrician and not a class of jobs as required by the Americans with Disabilities Act. However, the evidence pointed to the company's belief that the electrician's balance problems posed a threat when working with electricity and, therefore, the company demoted him. The judge wrote that if the electrician were in fact incapable of working around electricity due to this perceived impairment, it would significantly restrict his ability to perform an entire class of jobs in the electrical field. *Justice v. Crown Cork & Seal Co.*, No. 07-8036 (10th Cir. 2008)