
**ROSSWAY MOORE
& TAYLOR**

ATTORNEYS AND COUNSELORS AT LAW

CHARLES W. McKINNON
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.veroeachlawyers.com

TIFFANY GRIFFETH
SHANNON BANITT
KELLI SALO

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.

Wage & Hour

Fluctuating Work Week Deductions

Employers using the fluctuating workweek method of compensating employees need to be sure they comply with the Department of Labor regulations. In this method of payment, a non-exempt employee (i.e., one entitled to overtime) working a fluctuating workweek may be paid a salary in an amount agreed upon by the employer and employee covering straight-time compensation. A salary paid based on the fluctuating workweek method is intended to compensate an employee for whatever hours he is called upon to work in a workweek, whether few or many. Overtime is still paid after 40-hours per week but at half time rather than one and one-half the regular rate. The regular rate fluctuates with the number of hours the employee works each week. In an Opinion letter published May 12, 2006 (FLSA2006-15), the Department of Labor reconfirmed that employers

utilizing the fluctuating workweek method of payment may not make deductions from an employee's salary for absences occasioned by the employee when the employee has exhausted his or her sick leave bank or has not yet earned enough leave to cover the absence. Absences for sick, personal, and vacations may be deducted from the employee's leave banks, but the employer cannot make deductions for absences when the employee exceeds the accrual or before the employee becomes eligible to accrue leave. Disciplinary deductions from an employee's salary may be made for willful absences or tardiness or for infractions of major work rules, but only if the deduction does not result in the pay dipping below minimum wage and does not cut into overtime. If the deductions are made frequently or consistently, then the practice of making such deductions would raise questions as to the validity of the compensation plan. The fluctuating workweek method is different than payment to exempt employees under the

salary basis test. The salary basis test allows an employer to make deductions in full-day increments from an employee's pay for sickness when the employer has a policy permitting employees to accrue sick leave and the exempt employee is not yet eligible for the sick leave or has exhausted his leave.

Discrimination

Sexual Banter did not Create Hostile Environment

An employee who complained that his coworker's sexual banter about women was highly offensive could not establish that his work environment was sufficiently severe or pervasive to proceed with a harassment claim. The conduct took place sporadically over 20 years and was not violent or threatening to the coworker nor did it unreasonably interfere with his work performance. *Nitsche v. CEO of Osage Valley Elec. Coop.*, 97 FEP Cases 1850 (8th Cir. 5/8/06)

Workers' Compensation

Injured Employee May Sue in Tort

The Workers' Compensation Act is exclusive in place of all other liability to the employer when an employee is injured at work. The Act provides the employer immunity from liability even for an employer's negligence that has caused the employee's workplace injury. However, an employer's immunity under the Workers' Compensation system does not extend to workplace injuries caused by conduct of the employer so egregious that it is tantamount to an intentional tort. A recent decision of the Florida Supreme Court has made this distinction abundantly clear. "An employee who is injured in the workplace during the course and scope of his or her employment and receives workers' compensation benefits, but does not pursue a compensation claim to a conclusion on the merits, may file an action against an employer for that workplace injury if the employer's conduct is to the level of intentional conduct substantially certain to result in injury for which

workers' compensation immunity is not available." The mere fact that an employee has accepted workers' compensation benefits is not enough to constitute an election of remedies. This decision would require the compensation claim to have proceeded to conclusion on its merits before an employer would be protected from a lawsuit by an employee claiming an intentional tort in connection with his workplace injury. *Jones v. Martin Electronics, Inc.*, 2006 WL 1641944 (Fla. S. Ct. 6/15/06)

Disabilities

Punctuality is Essential Job Function

A paraplegic employee could not arrive at work in a punctual manner. Initially the employer used oral coaching to attempt to correct this behavior. When a new no-fault attendance policy was adopted and the employee's punctuality did not improve, he was discharged. The employer argued that by not arriving to work on time, he was slowing down his production, increasing overhead, and potentially increasing overtime costs. The employee could not perform his job from home or some other location. The Court ruled that the employee was not a qualified individual with a disability because he could not be at work on time. Moreover, the Court said, it is within the employer's discretion to determine what job functions are essential and it is beyond dispute that the employer made attendance and punctuality essential functions, both through its discipline of employees and clearly established policies. *Holly v. Clairson Industries, LLC*, 2006 WL 1319442 (M.D. Fla. 5/11/06)

Not Unlawful to Discharge Disabled Employee for Misconduct

A museum worker with bipolar disorder was discharged after his disruptive behavior resulted in the police carrying him out of the museum. The court held that a disabled individual cannot be qualified if he commits misconduct that would disqualify a non-

disabled individual. Further, the court said that consideration of whether he could have performed the job if given a reasonable accommodation was not required because his misconduct precluded him from performing the essential functions of his job. *Mammone v. President & Fellows of Harvard College*, 847 N.E. 2d 276 (Mass. 5/12/06)

Family Medical Leave

Discharge Upheld for Employee Who Failed to Return to Work After Twelve Weeks

A police officer with more than 12 weeks of sick leave accrual failed to return to work at the end of his 12-week Family & Medical Leave. The city discharged him and the police officer complained that he could not be discharged since he still had sick leave remaining. The court held that even though the officer had more than 12 weeks of sick leave, the city was not required to grant him more than 12 weeks of FMLA leave. *Slentz v. City of Republic, Mo.*, 11 WH Cases2d 769 (8th Cir. 5/12/06)

Job Elimination No Violation of FMLA

An employee returning from medical leave was informed that his job was being eliminated. The employer invited him to apply for a similar job. The employee contended that the FMLA guaranteed him his exact job when he returned from his leave. The Court disagreed. FMLA regulations guarantee employees returning from

leave no greater right to reinstatement than if he had been continuously employed. The court said that the employee's contention would lead to an absurd result. If that were the case, a company that closed a branch of its business while an employee was on leave, would have to restore the employee to a nonexistent position. *Yashenko v. Harrah's NC Casino Company*, No. 05-1256 (4th Cir. 4/27/06)

Miscellaneous

Discharge of City Employees Upheld

New York City firefighters and a policeman rode on a racist parade float in a Labor Day parade. They were off duty when they participated in the parade riding a float called "Black to the Future" intending to look at life in the mostly white community if it became more diverse. The men wore Afro wigs and blackface, and also ate watermelon. They chanted civil rights slogans and pretended to break dance. The employees claimed their First Amendment Free Speech Rights were violated when they were discharged. The Circuit Court of Appeals disagreed saying, "The First Amendment does not require a government employer to sit idly by while its employees insult those they are hired to serve and protect." *Locurto v. Giuliani*, No. 04-6480-cv(L), 04-6498-cv(CON), 04-6499-cv(CON) (2d Cir. 4/27/06)