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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 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 intended to be a substitute for legal advice.*

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*Family Medical Leave*

**Employees Are Not Always Required to Follow Formal Notification Rules**

An employee failed to give her employer formal notice of her need for Family and Medical Leave when she had to be hospitalized. Her employer was aware that she was taken by ambulance to the hospital for a nervous breakdown and even sent flowers to her. Still, the employer fired her for failing to provide proper notice of her need for FMLA leave. The court explained that the employee was required to give her notice as soon as practical in light of the circumstances of her case. Although it may not have been in the form the employer desired, the notice was enough to put the employer on notice that the employee needed the leave. Further, the employer had knowledge of the employee's pre-existing depression and a note from a treating physician which may have satisfied the

FMLA notice requirement. *Robinson v. Hilton Hospitality, Inc.* 11 WH Cases2d 447 (S.D. Ohio (3/1/06))

**Employee Unable to Perform Essential Functions Does Not Have to Be Reinstated**

A UPS employee claimed that his employer violated the FMLA by failing to reinstate him to his previous position when he asked to return to work. The essential functions of the employee's job included being able to concentrate, memorize and recall. The employee and his physician admitted he could not perform these functions at the time he initially asked to return to work. In rejecting the employee's claims, the court said that, unlike the Americans with Disabilities Act, the FMLA does not require employers to reinstate employees who are unable to perform the essential functions of their jobs. Nor does the FMLA require the employer to reasonably accommodate

employees who cannot perform their essential functions. *Battle v. United Parcel Service*, 438 F.3d 856 (8<sup>th</sup> Cir. 2/21/06)  
**Note:** Although UPS prevailed in the FMLA case, it was not so lucky in the ADA case. See below.

### *Disabilities*

#### **UPS Employee Awarded Lost Wages and Compensatory Damages**

An employee alleged that he had a nervous breakdown after a new district manager required him to memorize intricate, unpredictable data from a daily operations report and then berated him publicly when he failed. UPS argued that the employee was only mildly limited in his ability to think and concentrate and therefore was not a qualified individual with a disability under the ADA. At trial, the employee's psychiatrist testified that the employee's depression and anxiety substantially limited his ability to think and concentrate. He had presented a doctor's report stating he could perform his essential job functions but not the marginal ones including memorizing data. The court found that UPS failed to reasonably accommodate the employee's disability. *Battle v. United Parcel Service, Inc.*, 438 F.3d 856 (8<sup>th</sup> Cir. 2/21/06)

#### **No Violation of ADA When Employee Fired for Perceived Threats**

An employee told the company nurse, "When I leave here I will be taking a bunch of people with me." The employer believed the employee had threatened his co-workers. He was put on paid disability leave and required to see a psychologist. The psychologist was unable to conclude the employee had a mental condition. The employer terminated the employee for violating a workplace rule against threatening, intimidating, coercing or harassing coworkers and the employee sued. The Fourth District Court of Appeals concluded, "When an employer discharges

an employee because of a mistaken perception of misconduct, even if the misconduct would have been related to a disability," there is no violation of the Americans with Disabilities Act. The employer had a legitimate, nondiscriminatory reason for termination—a perception that the employee had made a death threat, justifying his discharge. *Pence v. Tenneco Auto. Operating Co. Inc.*, 05-1582 (4<sup>th</sup> Cir. 3/7/06) ADA protections extend to an individual with an impairment that substantially limits one or more major life functions, an individual with a history of such an impairment, or an individual perceived to have such an impairment.

### *Miscellaneous*

#### **Deletion of Data Violates Law**

An employee was given the use of a company laptop computer to record data on potential acquisitions for his employer. When he decided to leave the company to start a competing business, the employee installed a secure erasure program to guarantee that files deleted from the computer would not be found after he left. He then deleted data identifying properties his employer might want to acquire. The court held that the conduct was firmly within the statutory intent of Congress when it enacted the Computer Fraud and Abuse Act (18 U.S.C. §1030(a)(5)(A)(ii)). It said that Congress intended to regulate both disgruntled internal programmers and outside hackers. *Internal Airport Centers v. Citrin*, 24 IER Cases 129, No. 05-1522 (7<sup>th</sup> Cir. 3/8/06)

#### **Title VII Employee Threshold Not Subject Matter Jurisdiction**

A restaurant employer was sued by an employee for discrimination. A couple of weeks after the jury returned a verdict for the employee, the employer appealed claiming it did not have enough employees to be an "employer" under Title VII and that the court

lacked jurisdiction over the case. The appellate court agreed and threw out the verdict but the U.S. Supreme Court reinstated it. The Court held that the argument was made too late. An employer must raise the applicability of the statute issue early on and cannot wait until after the jury has reached a verdict. Further, the Court explained that the 15-employee requirement of Title VII is not jurisdictional because the requirement is not part of the provision giving federal courts jurisdiction over Title VII claims. Since the numerical threshold relates to the substantive adequacy of an employee's claim rather than the court's jurisdiction, the employer did not timely raise it. The employer is in the best position to know how many employees it has and, with the labor attorney, should have gotten the case dismissed at the EEOC charge stage. *Arbaugh v. Y&H Corp.*, 97 FEP Cases 737, No. 04-944 (2/22/06)

### **Public Sector Statutory Cap Applies to Florida Civil Rights Act**

An employee brought an action under the Florida Civil Rights Act against his former employer, Manatee County, for gender discrimination and retaliation. The Court rendered a verdict in favor of the employee awarding in excess of \$560,000 but then limited his total award to \$100,000. The employee appealed. The trial court determined that the employee's attorneys' fees, his costs and expenses, the compensatory damages award, and the back pay award were collectively subject to the

limitation on "the total amount of recovery" provided for in Florida Statutes §760.11(5), which by reference adopted the \$100,000 cap in Florida Statutes §768.28(5). The attorneys' fees amounted to \$291,743.75, costs and expenses were \$18,282.50, back pay was \$20,000 and compensatory damages for the plaintiff were in the amount of \$230,000. *Gallagher v. Manatee County*, 31 Fla. L. Weekly D 339, No. 2D04-3724 (Fla. 2d DCA 2/1/06)

### **Retaliatory Harassment is Viable Claim**

A postal worker claimed her supervisor made an unwanted sexual proposition. The worker complained and the supervisor was transferred and eventually fired. Thereafter, the employee's work station was moved to the spot where the former supervisor worked among employees who were loyal to him. As a result, she alleged that she endured 19 months of harassment and retaliation from fellow employees including frequent insults, offensive comments and threats. She reported this to management who took no action. Writing for the court, now Justice Samuel Alito noted that, while occasional insults and teasing is not enough to be covered by Title VII, a jury might well find the conduct here to be "severe and pervasive." When co-workers are the perpetrators, the plaintiff is required to prove the employer knew or had reason to know of the offending conduct but failed to take appropriate action. *Jensen v. Potter*, No. 04-4078 (3d Cir. 1/31/06)