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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.

Discrimination

*Operating Co., 97 FEP Cases 1473 (9th Cir.
4/14/06)*

Employer's Makeup Rule Upheld

A female bartender was discharged by Harrah's Casino because she refused to wear makeup. She felt that being required to wear makeup degraded and demeaned her and negatively impacted her self-dignity. In a lawsuit, she alleged that the rule violated Title VII of the Civil Rights Act of 1964 as amended. The *en banc* Ninth Circuit affirmed Harrah's right to fire the employee and upheld the right of employers to adopt and enforce reasonable employee dress and grooming standards. The court said that the policy was no more burdensome on women than men; that men were required to cut their hair while women were not; and that while women had to wear makeup, men were prohibited from doing so. The rule was not to make women sexually provocative and was not intended to stereotype women. *Jespersen v. Harrah's*

Employer not Liable for Supervisor's Spying

Two women alleged that for years their supervisor spied on them through a peephole in his office while they used the women's restroom. They alleged that the peeping along with placing a contaminant on the toilet seat and toilet paper created a hostile environment liability for the employer. The Court disagreed noting that neither of the employees knew of the supervisor's activities. The Court explained that a hostile work environment claimant may only rely on alleged harassing conduct that she is aware of at the time it happens. The supervisor pleaded guilty to criminal conduct but the appellate court concluded that the employer bears no liability under Title VII. *Cottrill v. MFA Inc.*, 97 FEP Cases 1487 (8th Cir. 4/7/06)

Religious Discrimination Claim Allowed to Proceed

An employee was discharged from a Home Depot store when he refused to work on Sundays. The employer offered to let him work Sunday afternoons or evenings so he could attend religious services, but the employee said his religious beliefs required him to abstain from work totally on Sundays. The court concluded that an accommodation that does not eliminate the conflict between an employment requirement and a religious practice is not reasonable as a matter of law. The appellate court rejected the employer's claims that the employee's religious beliefs were not sincerely held. *Baker v. The Home Depot*, 97 FEP Cases 1569 (2nd Cir. 4/19/06)

Disabilities

Student's Ban from Campus Not Retaliatory

A university student allegedly complained to a civil rights investigator that a professor made him so mad he wanted to put a bullet in the professor's head. The investigator perceived this as a threat and so advised university officials. When the student was banned from the campus, the student alleged that it was in retaliation for his complaints of failure to accommodate. However, he did not show that the university's reason for the ban was pretextual and the university was granted summary judgment. The court found no dispute that the investigator sincerely perceived the student's comment as a direct threat and this was the reason he was banned from campus. *Mershom v. St. Louis University*, 17 AD Cases 1354 (8th Cir. 4/5/06)

Direct Evidence of Discrimination Not Found in Supervisor's Comment

A supervisor allegedly commented that a former employee was old and worn out and should quit because he was frequently absent due to medical problems. The employee sued the employer for age and disability discrimination. The Eighth Circuit Court of Appeals affirmed the district court's summary

judgment in favor of the employer because the employee failed to establish his case. Acknowledging that direct evidence includes discriminatory statements, the court said that those statements must be made by decisionmakers to be direct evidence of discrimination. Here the supervisor was not involved in the decision to discharge the employee; he merely provided information to human resources of the employee's excessive absenteeism and informed the employee of his discharge. The court also found that the employee did not show he was able to perform his job duties and therefore, could not establish a *prima facie* case of discrimination. *Schierhoff v. GlaxoSmithKline Consumer Healthcare L.P.*, 444 F.3d 961 (8th Cir. 4/14/06)

Being Associated with an Individual with a Disability does not Require Reasonable Accommodation

A truck driver asked her employer for a day off because of obligations to her daughter who was disabled. The employer refused and terminated her when she failed to find a replacement for her shift. The driver claimed she was fired because of her daughter's disability. The Americans with Disabilities Act prohibits discrimination against an individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association. However, unlike a claim brought by a disabled person, an employer is not required to reasonably accommodate an employee based on her association with a disabled person, the court said. The company did not base its decision on a belief that the employee would have to miss work to care for her daughter, the court concluded, but rather on her record of declined shifts and the absence on the Saturday in question. The court said that the FMLA does not provide for every family emergency and that the employee did not show that she was needed to care for her daughter or that her Saturday activity constituted FMLA-qualifying care. *Overley v. Covenant Transp. Inc.*, No. 05-528 (6th Cir. 4/27/06)

Employee Could Not Prove Her Arthritis was a Disability

A clerk developed arthritis and her manager put her on light duty for six weeks, extending the assignment repeatedly. Finally, the supervisor told her that she was approaching the limit for her light duty assignment and asked her to resign. When she refused, she was discharged. The employee sued for violating the ADA. The district court concluded that the employee did not show that she was disabled under the ADA, and the court of appeals agreed. The court said that in an action of this type, a plaintiff must show that a major life activity is substantially limited. In this case, the plaintiff could not prove that she was limited in the major life activities of walking and standing. *Lawler v. QuikTrip Corp.*, No. 04-5132 (10th Cir. 3/29/06)

Family Medical Leave Act

Formal Notice of FMLA Did Not Bar Employee's FMLA Claim

A machine operator with a mental condition was fired for poor performance. The employer knew that the worker had a mental condition but argued the worker did not give notice that his poor performance was caused by his mental condition. The worker's behavior had progressively deteriorated over a period of time and there was a disputed issue of material fact whether this progressive behavioral change provided notice to the employer that the worker needed a leave. The court allowed the worker to proceed with his FMLA claim. *Lozano v. Kay Mfg. Co.*, 11 WH Cases2d 663 (N.D. Ill. 3/28/06)

Employee Does Not Have Absolute Right to Return to Job Following FMLA Leave

A terminated casino employee filed a state court action against a casino management company for violation of the Family and Medical Leave Act. While the employee was on leave, his position was eliminated in a

company reorganization. The Court held that the FMLA does not provide a covered employee with an absolute right to be restored to his previous job after taking leave. An employer may deny restoration when it can show that it would have discharged the employee in any event regardless of the leave, the court concluded. *Yashenko v. Harrah's NC Casino Co.*, 11 WH Cases2d 708 (4th Cir. 4/27/06)

Discharge Not Motivated by Leave

A former employee filed a lawsuit alleging that he was discriminatorily discharged for taking FMLA leave. The federal district court granted summary judgment to the employer and the appellate court affirmed. The appellate court found that the employee failed to prove that his termination was not for violating the company's drug policy as the employer had alleged. He also failed to show a meaningful comparison between the circumstances of his discharge and those of similarly situated employees. The court found there was not enough circumstantial evidence from which a reasonable jury could conclude the employee was fired for taking FMLA leave. *Hull v. Stoughton Trailers LLC*, 11 WH Cases2d 705 (7th Cir. 4/26/06)

Employee Discharged for FMLA Abuse

An employee had asked his employer for vacation but his request was denied. He then feigned a knee injury in order to vacation in Las Vegas with his fiancée who was also a coworker. When the company recognized the coincidence of both employees taking vacation at the same time for the last two summers, it hired a private investigator that videotaped the employee doing yard work during his leave. The court determined that an employer's honest suspicion that the employee is not using his medical leave for its intended purpose is enough to defeat the employee's claim that his FMLA rights were violated. *Crouch v. Whirlpool Corp.*, 11 WH Cases2d 716 (7th Cir. 4/20/06)