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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*

#### **Good Interview Planning and Techniques Pay Off**

A woman sought an entry level position with an electric and gas utility but was rejected. She alleged and was able to establish a *prima facie* case of sex discrimination under Title VII. The employer responded by providing a legitimate, non-discriminatory reason for not hiring the woman—poor performance in a job interview compared to that of other applicants. The utility put forth a sufficient rebuttal by producing score sheets showing that she ranked second to last among applicants who were interviewed. The court said that the utility's criteria to rate the interviewees were not excessively subjective. Further, the court said the various statistics presented by the woman to support an inference of pretext failed to show a gender disparity with respect to the hiring process and did not account for her poor interview performance. The principal decision maker testified that the refusal to hire

her was based on her interview and the court agreed. *Turner v. Public Service Co. of Colorado*, No. 07-1396 (10<sup>th</sup> Cir. 2009)

This is an excellent example of the right way to make hiring decisions. First, ask all applicants the same questions, develop an assessment score sheet based on the duties and attributes needed for the job, and then objectively rate and rank the applicants.

#### **Employee's Discharge for Refusing to Sign Performance Improvement Plan Not Retaliation**

A receptionist was counseled about performance issues including coworkers' complaints about her frequent absences and personality conflicts. When she was injured in a car accident, she took Family Medical Leave. Upon return, her performance issues continued and about six weeks after her return to work, the receptionist was presented with a performance improvement plan. When she refused to sign the performance improvement

plan, she was advised that if she refused to sign the improvement plan, she would be discharged. She refused and was discharged. The receptionist argued that the improvement plan itself constituted an adverse action and that she was being retaliated against for having taken FMLA. The court said that the decision to take FMLA leave cannot immunize that employee from those petty slights or minor annoyances that often take place at work and that all employees experience. It concluded that the act of requiring the employee to sign the improvement plan was not a materially adverse action. The court further concluded that there was nothing the receptionist could point to that reasonably suggests that her termination was motivated by anything other than her refusal to accept the improvement plan. *Cole v. Illinois*, 562 F.3d 812 (7<sup>th</sup> Cir. 2009)

### **Supreme Court Decided Pregnancy Discrimination Case**

In a 7 to 2 decision, the U. S. Supreme Court held that an employer does not necessarily violate the Pregnancy Discrimination Act (PDA) when it pays pension benefits calculated in part under an accrual rule, applied only pre-PDA that gave less retirement credit for pregnancy than for medical leave generally. In other words, AT&T's pre-PDA decision not to award women service credit for pregnancy leave was not discriminatory. Because AT&T's pension payments accord with a bona fide seniority system's terms, they are insulated from challenge under Title VII §703(h).

In this case, AT&T had based pension calculations on a seniority system that relied on years of service minus uncredited leave time, which gave less retirement credit for pregnancy absences than for medical leave. Employees who took medical leave were awarded pension credits for the entirety of their leave while those who took pregnancy leave received a maximum credit of 30 days. This arrangement was lawful at the time. In

1978 Congress added the PDA to Title VII to make it clear that it is discriminatory to treat pregnancy-related conditions less favorably than other medical conditions. On the PDA's effective date, AT&T replaced its old plan with a new one which provided the same service credit for pregnancy leave as for other disabilities prospectively, but did not make any retroactive adjustments to the pre-PDA personnel policies. The union and several women who had taken maternity leaves before the effective date of the change sued.

The Court said that the only way to conclude that §703(h) does not protect AT&T's system would be to read the PDA as applying retroactively to recharacterize AT&T's acts as having been illegal when done. The Court said this result was not a serious possibility. Generally, there is a presumption against retroactivity unless Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits, and there was no such clear intent with the PDA. The AT&T seniority system at issue here was not discriminatory when adopted, let alone intentionally discriminatory. Although adopting a service credit rule unfavorable to those out on pregnancy leave would violate Title VII today, a seniority system does not necessarily violate the statute when it gives current effect to such rules that operated before the PDA. Seniority systems are afforded special treatment under Title VII reflecting Congress' understanding that their stability is valuable in its own right. *AT&T Corp. v. Hulteen et al.*, No. 07-543 (5/18/09)

### *Proposed Legislation*

### **Comparable Worth Bill Reintroduced**

The Fair Pay Act (H.R. 2151/S.904) was reintroduced in the House and Senate on April 28. This bill would amend the Fair Labor Standards Act and require "equal pay" for jobs that are equivalent in skills, effort,

responsibility, and working conditions. Under the Equal Pay Act, female workers making wage discrimination claims must show they were paid less than men holding the identical job. This bill would: prohibit wage discrimination based on sex, race, or national origin; require employers to publicly disclose job categories and their pay scales; and give workers alleging unlawful wage discrimination the option to file an EEOC charge or sue for damages in federal court. Employers could still pay different wages to employees based on a (1) seniority system, (2) merit system, (3) system that measures earnings by quantity or quality of production, or (4) a differential based on a bona fide factor other than sex, race, or national origin. Bona fide factors other than sex may include education, training, or experience. However, this fourth factor will apply only if the employer demonstrates that it is job-related with respect to the position in question or furthers a legitimate business purpose.

#### **FMLA Expansion Bills Introduced**

Two bills (H.R. 2161 and H.R. 2132) were recently introduced in the House that would expand the scope of the Family and Medical Leave Act and eliminate certain “restrictive rules” regarding the FMLA that were implemented during the Bush administration

and took effect in January 2009. This is not unexpected as the Obama administration and Congress attempt to reverse or severely restrict what they deem to be employer-friendly legislation. H.R. 2132 would amend the FMLA to permit leave to care for a domestic partner and a wide range of family relations.

#### *Miscellaneous*

#### **Social Security Number Verification**

Employers can now verify employee Social Security Numbers over the telephone 24 hours a day, seven days a week by using the Social Security Administration’s automated Telephone Number Employer Verification (TNEV) service. Beginning in the fall, Social Security Administration’s telephone agents will no longer verify numbers for employers. Employers will then need to use TNEV or the online equivalent, Social Security Number Verification Service (SSNVS). However, to use the TNEV, employers and third parties acting on their behalf must first sign up for SSNVS. The web site requires personal information about the individual enrolling and about the employer. There is also a link to fact sheets for more information about TNEV. [www.socialsecurity.gov/employer/](http://www.socialsecurity.gov/employer/)