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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.

Harassment

\$585,000 Awarded to Harassed Workers

A jury awarded \$585,000 to 13 young female telemarketers, nine of whom were teenagers. The suit filed by the Equal Employment Opportunity Commission alleged that the women were subjected to verbal and physical harassment by male managers between 1998 and 2001. According to the complaint, the harassment included male managers smacking female employees on the buttocks, attempting to grab their breasts and pressuring them for sex. There were also lewd and graphical sexual comments, gestures, and requests for female employees to wear specific types of clothing and do table top dances. The employer failed to take the necessary steps to stop the harassment after repeated complaints by the employees. *EEOC v. Everdry Marketing and Management, Inc.*, No. 01-CV-6329 (W.D. NY 10/27/06)

EEOC Gets \$1.5 Million Harassment Settlement

A brokerage firm agreed to pay \$1.5 million under a consent decree with the Equal Employment Opportunity Commission to resolve allegations of sexual harassment by a manager. The EEOC filed a suit under Title VII in February 2005 on behalf of four named female former employees. The commission alleged harassment and retaliation dating back to 2001. Allegations included groping, solicitations for sex, offensive comments, among other actions. The employer must revise and expand its anti-harassment and anti-retaliation policies and its training on sexual harassment. *EEOC v. David Lerner Assoc. Inc.*, (10/6/06)

Disabilities

Injury to Dominant Arm Not Disability

A right handed employee who broke his right arm was ruled not to be disabled under

the Americans with Disabilities Act because he could still care for himself using his left hand. The employee had alleged he was substantially limited in the major life activity of caring for himself because he had difficulty performing such tasks as shaving, brushing his teeth and eating. The court ruled that this was insufficient to show he was disabled under the ADA because he admitted he could do most everything with his left hand, although it took him longer. In addition, the court found that because he could tie his shoes, wash dishes and prepare meals, his broken right arm did not prevent or severely restrict him from caring for himself. The employee also alleged that the employer failed to accommodate his injury by denying his request to have a coworker open and close doors on the truck he drove. The court found that the denial of this accommodation was not a violation of the ADA because it was not related to his claimed disability of being substantially limited in caring for himself. The employee did not allege that he was substantially limited in the major life function of working. *Didier v. Schwan Food Co.*, 18 AD Cases 915 (8th Cir. 10/16/06)

Nursing Home Violated ADA When it Fired Cook with Hepatitis C

A jury awarded a nursing home cook \$20,000 in compensatory damages, and the district court awarded her \$1250 in back pay but refused to instruct the jury on punitive damages. The nursing home administrator informed the cook that she could not work in the kitchen because she had hepatitis C. She told the EEOC investigator, "How would you like to eat food containing her blood if she ever cut her finger? If this got out, there would be mass exodus from the home." The jury found that the nursing home regarded the cook as disabled in the major life activity. The appeals court returned the case to the district court to determine punitive damages, saying the trial court should have allowed the jury to punish the home for discriminating against her. *EEOC*

v. Heartway Corp., 18 AD Cases 993 (10th Cir. 10/26/06)

Proposed Legislation

ADA Restoration Act Introduced In Congress

Legislation was introduced September 29, 2006 that its sponsors say is intended to restore protections for disabled individuals under the Americans with Disabilities Act. The legislation is in response to the Supreme Court's decisions interpreting the ADA and will expand the ADA to protect all individuals with disabilities from discrimination. H.R. 6258 would change the statutory definition of "disability" by dropping the requirement that an impairment "substantially limit a major life activity." It also specifies that neither the episodic nature of an impairment nor the use of mitigating measures should be taken into account when determining whether a person has a qualifying physical or mental impairment. The bill provides specific definitions for physical and mental impairments, record of physical or mental impairment, and perceived physical or mental impairment. Finally, the bill would alter the meaning of discrimination in the ADA by replacing the phrase "against individuals with disabilities" with "on the basis of disability."

Discrimination

Pregnant Police Officer Not Entitled to Light Duty

A pregnant police officer requested light duty assignments because she was pregnant. The employer denied her request and the police officer sued. She alleged that male officers had continued to work although they were temporarily unable to perform all job duties and thus were treated more favorably. The court found that the male officers were not similarly situated to the female officer because they neither

sought accommodation nor had medical restrictions that prevented them from performing their regular duties. The employer also was able to show that its refusal of light duty was not a pretext for discrimination by showing that it prohibited all light duty assignments. *Tysinger v. Police Department of the City of Zenesville*, 98 FEP Cases 1705 (6th Cir. 9/25/06)

Discharge Not Based on Age or Sex

A former financial analyst alleged she was discharged during a reduction in force because of her age and gender and that the firm's explanation that she was laid off because of poor performance was pretextual. The analyst was 51 years old and was among others selected in a departmental layoff. The court rejected the allegations. Several protected-age analysts survived the layoff, including one who was also 51 years old, and younger analysts were also discharged at various times. *Wittenburg v. American Express Financial Advisors*, 98 FEP Cases 1697 (8th Cir. 9/28/06)

Sidley Austin Must Defend Lawsuit

Sidley Austin is a large law firm that demoted 31 partners after amending its retirement age to a sliding scale that began at age 60. The EEOC started an investigation into the alleged age discrimination without receiving a complaint from any of the partners. In the latest action, Sidley Austin appealed to the U.S. Supreme Court arguing that the EEOC has no authority to seek monetary damages. The Supreme Court declined to hear the appeal. In 2002, the Supreme Court held that the EEOC has a statutory right to seek damages separate from an individual plaintiff's right. Sidley Austin may still have an argument that the partners are exempt under the ADEA because they are not employees.

Miscellaneous

Independent Contractor Status No Protection Against Liability for Employer

A woman signed a consent for medical and surgical treatment at a hospital in Florida which notified her that she may be treated by physicians who are not employees or agents of the hospital but are independent physicians. The woman gave birth to a child needing resuscitation. She contends that the doctor was negligent in failing to be present, to communicate, and to order necessary tests as well as failing to order the necessary means of resuscitation leaving the child with disabilities. She sued the hospital for malpractice. The hospital defended saying the doctor was an independent contractor and not an agent of the hospital so they were not the proper defendant in the suit. The court pointed out that there are a lot of exceptions to the general rule that one who hires an independent contractor is not liable for injuries caused by the contractor's negligence. One important exception is failing to exercise due care in the selection and retention of an independent contractor physician on the hospital staff. "Concepts of independent contractor and non-delegable duty have no application when a person or entity doing the hiring of the independent contractor has undertaken by contract with a third party to perform a service and hiring an independent contractor is, essentially, hiring a sub-contractor to perform the work which the hiring person has undertaken by contract to perform." In other words, the hospital contracted to perform medical and surgical treatment for the woman and sub-contracted that treatment to the independent physician. The hospital cannot escape liability for damage by delegating the work to a contractor. *Pope v. Winter Park Healthcare Group, Ltd.*, 939 So.2d 185 (Fla. 5th DCA 10/6/06)

This case applies in the medical or hospital setting as well as those outside of health

care. It applies to anyone who uses written contracts or consent forms with clients or customers and then hires independent contractors to perform the work.

General Manager Attempts to Walk Off with Trade Secrets

The general manager of a car dealership began negotiating for a similar position before handing in his resignation. During that time, he took home recent sales conference documents and downloaded 26 computer files containing pertinent information needed to start up a car dealership as well as inside information regarding the dealership's sales, employee pay and incentives, and internal business development programs. When it was discovered, the employer sued the general manager to get a temporary injunction for actual or threatened misappropriation of trade secrets under Florida's Trade Secret Act. The court granted the injunction requiring the employee to (1) return all materials he misappropriated from the dealership; (2) refrain from disclosing any information about the dealership to any person or entity; (3) refrain from engaging in

selling, leasing, or servicing any new or used vehicles or parts, either wholesale or retail; and (4) make available for the dealership's inspection the laptop computer to which he sent its sensitive information. *Hatfield v. AutoNation, Inc.*, 939 So.2d 155 (Fla. 4th DCA 9/27/06).

Employee Wins USERRA Claim

A military reservist won his case under the Uniformed Services Employment and Reemployment Rights Act (USERRA) against the City of San Diego. The plaintiff claimed he was constructively discharged from his job with the city when his boss made his life miserable, passed him over for promotion and threatened him with termination following the plaintiff's military tours of duty. Even though the plaintiff's working conditions improved somewhat just before his resignation, the Ninth Circuit Court of Appeals found he faced unfounded disciplinary action in his position. Further, the evidence showed that the city had a history of taking disciplinary action against the plaintiff for pretextual reasons and without investigation. *Wallace v. City of San Diego*, No. 03-56552 (9th Cir. 8/25/06)