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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.

Discrimination

Rude Airline Employee's Discharge Upheld

Doris Riggs appealed the district court's entry of summary judgment against her on her claim that AirTran Airways Inc., terminated her in violation of the Age Discrimination in Employment Act (ADEA). AirTran employed Ms. Riggs as a customer service agent in Wichita, Kansas from April 19, 2002 to June 19, 2003. Ms. Riggs' duties included working at the front ticket counter, the gate counter, and on the ramp loading and unloading luggage. At the time of the incident leading to her termination, Ms. Riggs was 67 years old. On two occasions prior to the termination, Ms. Riggs' supervisor allegedly commented on Ms. Riggs' age. The first took place when the supervisor discussed her mother's heart surgery, and Ms. Riggs revealed that she was the same age as her supervisor's mother.

The supervisor responded that Ms. Riggs did not look as old as she was. Ms. Riggs did not take offense at the comment and did not feel the need to report the incident. Subsequent to that exchange, the supervisor assisted Ms. Riggs with luggage and commented that Ms. Riggs was too old to be lifting heavy bags. Although this comment embarrassed Ms. Riggs, she did not report the incident. Additionally, the supervisor complained about AirTran's seniority policy, under which Ms. Riggs was given seniority over other employees who had begun work on the same date because of her age.

Just prior to her termination, Ms. Riggs had difficulty checking in a group of children who were members of a choir. Complaints from passengers were overheard that Ms. Riggs had been rude. A few days after the incident, the choir group's travel agent, sent an email to AirTran's National Sales Director complaining about the way AirTran

employees treated the group during check-in at the Wichita airport. Following an investigation of the incident, her supervisor recommended that Ms. Riggs be terminated because she had been rude and because she represented herself to the group as the supervisor. Ms. Riggs was terminated and eventually filed a complaint alleging a violation of the ADEA. The district court ruled in AirTran's favor on its motion for summary judgment finding that Ms. Riggs failed to prove that AirTran's reasons for terminating her were a pretext for age discrimination based, among other things, on the comments of the supervisor. However, Ms. Riggs was unable to show these comments in context or show any relationship between the comments and the decision to terminate her. The appellate court upheld the lower court's granting of AirTran's motion for summary judgment. *Riggs v. AirTran Airways, Inc.*, 2007 U.S. App. Lexis 18769 (10th Cir. 8/8/07).

Pregnancy Discrimination Act Violated by Discriminatory Benefit Calculation

The Ninth Circuit Court of Appeals held that AT&T violated the Pregnancy Discrimination Act (PDA) when it treated leave taken prior to the enactment of the Act less favorably than temporary disability leaves of other employees. Prior to the enactment of the PDA in 1978, AT&T had a policy of granting only 30 days of service credit to an employee "affected" by pregnancy but granted the full term of the leave as service credit for other types of temporary disability leaves. AT&T changed its policy when the PDA was enacted. However, at the time of retirement, AT&T granted only 30 days of service credit for the pre-PDA leaves. When it was sued by a retiring female who had taken maternity leave prior to the revised policy, AT&T defended saying that the PDA should not be applied retroactively and that at the time it allowed only 30 days of service credit to employees affected by pregnancy, there was no law to prohibit its policy. AT&T also

alleged that the complaint was untimely. The Ninth Circuit disagreed saying that AT&T violated the PDA when it calculated retirement and the complaint was timely filed. The Sixth and the Seventh Circuits have not given retroactive effect to the PDA which signals a possible appeal to the U.S. Supreme Court. *Hulteen v. AT&T*, 2007 U.S. App. LEXIS 19586 (9th Cir. 8/17/07).

Discussion About Breast Augmentation Not Sexual Harassment

An employee had 7 to 10 breast augmentation surgeries and had also gained 23 pounds. As a result, the employee's clothes no longer fit her properly which violated the employer's dress code requiring all employees to project a positive, professional image. The employee's supervisor counseled the employee about her clothing and specified which clothing was considered inappropriate. The employee believed the counseling and the supervisor's prior comments about her breast size was discriminatory because no attention was given to male employees who wore ill-fitted pants. The employee admitted that she is the one who revealed to her supervisor and other women in the department that she had undergone breast augmentation surgeries and that she never indicated that she did not want to discuss the topic. She also alleged that the district administrator leered at her breasts persistently and pervasively.

The employee filed an internal complaint which was investigated. The employer found no discrimination. The employee eventually sued alleging, among other things, hostile environment sexual harassment. Responding to a motion for summary judgment by the employer, the court said the employee did not establish that she suffered an adverse employment action and that similarly situated persons outside her class were treated more favorably. Also, the district administrator's conduct was not

sufficiently severe or pervasive to create a hostile work environment as it was not threatening or humiliating and did not alter the terms of the employee's employment. The court granted the employer's motion. *Pelletier v. Reedy Creek Improvement District*, 2007 U.S. Dist. LEXIS 29625 (M.D. Fla. 4/07)

Disabilities

Back Injury Not Found to be Substantially Limiting

A nurse contended that her lifting restrictions precluded her from performing all nursing jobs involving patient care but that she was qualified for registered nurse positions at the employer's affiliated clinics where lifting was not an essential function. She alleged she was substantially limited in her ability to work. However, by her own allegations, the nurse showed that she was not disabled as she showed there were other jobs in the nursing field for which she was qualified. The court held that the nurse failed to prove that she was significantly restricted in a class of jobs since a "class of jobs" includes all jobs utilizing similar training, knowledge, and skills as the job for which she was disqualified. *Squibb v. Memorial Medical Center*, No. 06-2389 (7th Cir. 8/16/07)

Court Dismisses Complaint of Vexatious Litigant

A disabled man filed hundreds of Americans with Disabilities Act (ADA) claims against

private businesses in California. He filed this case during the same five-day period he filed 12 others alleging virtually identical injuries. Citing a pattern of extortion, the Ninth Circuit Court of Appeals upheld the lower court's summary judgment against the Plaintiff and upheld two orders declaring the Plaintiff to be a vexatious litigant and sanctioning the law firm that represented him. The orders require the Plaintiff and his attorney to get court approval before filing any ADA claims in the central district of California. The district court had found the allegations in Plaintiff's numerous and similar complaints were contrived and not credible. He often filed multiple complaints against separate establishments asserting that he had suffered identical injuries at each establishment on the same day. The court noted that, of the 400 suits the Plaintiff had filed, he settled all but one. This suggested to the court that the Plaintiff's motivation was to extract cash settlements. The law firm had filed at least 223 nearly identical lawsuits in the Northern and Central Districts of California. The complaints all stated an ADA claim and the same four claims under California state law. The damages requested in each case were identical and other than superficial alteration of the names and facts, the complaints were textually identical down to the typos. The law firm had also sent a letter advising defendants against hiring a lawyer. *Molski, et al. v. Evergreen Dynasty Corp., et al.*, 2007 U.S. App. LEXIS 20966, No. 05-56452 (9th Cir. 8/31/07)