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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*

#### **Transgender Woman Prevails in Lawsuit**

The Eleventh Circuit Court of Appeals has ruled that an employer may not discriminate against a transgender employee on the basis of gender non-conformity. The three-judge panel ruled that the Georgia General Assembly's Office of Legislative Counsel (OLC) violated the Equal Protection Clause's prohibition on sex-based discrimination by firing Vandy Beth Glenn after she revealed plans to undergo gender reassignment surgery, since discrimination against such individuals because of their gender non-conformity constitutes gender stereotyping form of sex discrimination. Gender stereotyping is subject to heightened scrutiny under the equal protection clause, and the state's concern that other women might object to employee's restroom use failed to

show that termination was substantially related to important governmental interest, as this concern was based on speculation. *Glenn v. Brumby*, (11<sup>th</sup> Cir. 2011)

#### **Pregnancy Discrimination Not Shown**

A Federal agency's denial of a black female employee's requests to reasonably accommodate her pregnancy-related complications is not an adverse employment action sufficient to support her prima facie case of race, sex, or pregnancy discrimination, or of retaliation for complaining of sexual harassment. The Court held that the employer's refusal to accommodate the employee's pregnancy complications did not affect the terms of her employment, that there is no duty to accommodate an employee who does not have a disability under the Americans with Disabilities Act, and pregnancy-related

complications are not a disability under the ADA. (*Jeudy v. Holder*) No. 10-22873 (S.D. Fla. 2011)

### **No Sexual Harassment Found**

An affirmative defense is available to an employer on a female employee's claim of sexual harassment by her supervisor, even though she experienced a tangible employment action by getting fired. The supervisor who allegedly harassed her did not take part in the decision to discharge, and cases holding that the defense is unavailable if supervisory harassment "culminated" in tangible employment action are premised on the harasser being involved in that action. The employer is entitled to summary judgment on its affirmative defense despite contention that she should be excused from her failure to complain about him because she had a "credible fear" that she would not be taken seriously or that it would lead to retaliation, where employer's anti-harassment policy allowed her to bypass supervisor in making complaints. Further, the employee's alleged threats to retrieve a gun and kill a co-worker were legitimate reason for the employer to terminate her. The employee failed to show that the employer's reason for discharge was a pretext for retaliating against her for complaining of sexual harassment, despite contention that other employees who made threats were not terminated. *Theus v. GlaxoSmithKline*, No. 10-5649 (6th Cir. 11/30/11)

### **No FMLA Discrimination Found**

A factory worker failed to show that an auto manufacturer retaliated against her in violation of the Family and Medical Leave Act when it discharged her for repeated absenteeism shortly after she was diagnosed with obstructive sleep apnea, the U.S. Court of Appeals for the Sixth Circuit ruled. Even though the worker was able to establish a *prima facie* case of retaliation, she failed to show that the company's nondiscriminatory

reason for her firing was pretextual, the court held. The worker was unable to rebut the manufacturer's nondiscriminatory explanation for her dismissal or show that the manufacturer harbored any willful discriminatory intent in light of her failure to provide medical certification for some absences, to rectify contradictory and questionable medical certifications for other absences, and to show certain absences qualified as intermittent FMLA leave given that she had never requested nor was she eligible for such leave. The employee conceded that no one so much as suggested that her termination was related to FMLA leave, nor does the record suggest that any of her supervisors ever complained about any of the 86 legitimate leave days she had taken, the court noted. Finally, when it came to her unsubstantiated absences, the record indicated that the company treated her no differently than any other employee who neglected to submit timely certification. *Coffman v. Ford Motor Co.*, No. 10-3842 (6th Cir., 11/22/11).

### *New and Proposed Rules*

### **FLSA Companionship Exemption**

The Obama administration on Dec. 15, 2011, took aim at a Bush administration Labor Department interpretation that was upheld in a 2007 Supreme Court ruling that widened the application of the Fair Labor Standards Act (FLSA) companionship exemption. The proposed rule, announced by President Obama and Secretary of Labor Hilda Solis, would ensure that home care workers receive minimum wage and overtime. In *Long Island Care at Home Ltd. v. Coke*, 551 U.S. 158, 171 (2007) the U.S. Supreme Court ruled that the exemption under the Bush administration did not apply to home health care workers employed by agencies. The Supreme Court stated that "as long as interpretive changes create no unfair surprise—and the department's recourse to notice and comment rulemaking in an attempt to codify its new interpretation

makes any such surprise unlikely here—the change in interpretation alone presents no separate ground for disregarding the departments present interpretation.” In the preamble to its proposed rule, the Labor Department asserted that it now believed that its prior stance in the Coke case was erroneous, and that the department now believes that the companionship exemption was not intended to apply to third party employers. The department further observed that “the court explicitly recognized that the department may interpret its regulations differently at different times in their history and may make changes to its position provided that the change creates no unfair surprise.” The comment period on the proposed rule is 12/27/11 through 2/27/12.

### **OFCCP Proposed Rule Set Hiring Goal for Disabled Individuals**

The United States Department of Labor’s Office of Federal Contract Compliance Programs (“OFCCP”) recently proposed a new rule that would require federal contractors and subcontractors to set a hiring goal of having 7% of their workforces comprised of disabled workers. The proposed rule would amend Section 503 of the Rehabilitation Act of 1973, which obligates contractors to ensure equal employment opportunities for qualified workers with disabilities. This represents the first time the government has sought to establish a specific hiring goal relating to individuals with disabilities and is intended to reduce the high unemployment rate among the disabled population.

### **New Fact Sheets from DOL**

The U.S. Department of Labor Wage and Hour Division (WHD) has today released three new fact sheets on the topic of retaliation.

Fact Sheet #77A, prohibiting retaliation under the Fair Labor Standards Act (FLSA), provides general information concerning the FLSA’s prohibition of retaliating against any employee who has filed a complaint or cooperated in an investigation and is available on the WHD website at <http://www.dol.gov/whd/regs/compliance/whd/fs77a.htm>

Fact Sheet #77B, protection for individuals under the FMLA, provides general information concerning the Family and Medical Leave Act’s (FMLA) prohibition of retaliating against an individual for exercising his or her rights or participating in matters protected under the FMLA and is available on the WHD website at <http://www.dol.gov/whd/regs/compliance/whd/fs77b.htm>

Fact Sheet #77C, prohibiting retaliation under the Migrant and Seasonal Agricultural Worker Protection Act (MSPA), provides general information concerning MSPA’s prohibition of discrimination against a migrant or seasonal agricultural worker who has filed a complaint or participated in any proceeding under or related to MSPA and is available on the WHD website at <http://www.dol.gov/whd/regs/compliance/whd/fs77c.htm>