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March 2010

## 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*

### Time to Rethink Your Sexual Harassment Reporting Procedure

A female employee was subjected to sexually harassing conduct from her supervisor. She complained to her supervisor (the alleged harasser) about it pursuant to the company's policy that required employees to bring complaints to their supervisor, human resources, or any member of management. The employer argued that it was unreasonable as a matter of law for her to complain to the alleged harasser and that she should have complained to human resources or to another manager. The Appeals Court disagreed and held that the *Faragher/Ellerth* affirmative defense to harassment was not available to the company because she followed company policy with her complaint. Furthermore, the court said, the employee presented evidence that pursuing other avenues of complaint would have been futile. *Gorzynski v. JetBlue Airways Corp.,* No. 07-4618-cv (2d Cir. 2010) We recommend that employees be required to take harassment complaints directly to human resources (or equivalent) to avoid a similar outcome. Not everyone knows how to respond to a harassment complaint. Only those people who have the knowledge and/or training to recognize harassment and the ability to correct the conduct should be listed as the recipient of a harassment complaint.

### Third Party Harassment

The plaintiff was a former Merchant Marine who was accustomed to foul language. However, when she went to work for C.H. Robinson Worldwide, Inc., she was subjected on a daily basis to coworkers referring to various sexual acts, listening to sexually crude radio programs, and calling women offensive names. Not all of the language was offensive to women so the district court ruled that because the language was used and the radio program was played in the presence of all employees, "both men and women were afforded like treatment," and the plaintiff was not "intentionally singled out for adverse




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treatment because of her sex." The Eleventh Circuit Court of Appeals in Atlanta agreed that not all objectionable conduct or language amounts to discrimination under Title VII. "Nevertheless, a member of a protected group cannot be forced to endure pervasive, derogatory conduct and references that are gender-specific in the workplace, just because the workplace may be otherwise rife with generally indiscriminate vulgar conduct. Title VII does not offer boorish employers a free pass to discriminate against their employees specifically on account of gender just because they have tolerated pervasive but indiscriminate profanity as well." Further, the court said, "A final principle that guides us in this decision is that words and conduct that are sufficiently gender-specific and either severe or pervasive may state a claim of a hostile work environment, even if the words are not directed specifically at the plaintiff." *Reeves v. C.H. Robinson Worldwide, Inc.* 594 F.3d 798 (11th Cir. 2010)

*Family & Medical Leave Act*

**Layoff During FMLA Not Found to Be Discrimination**

A pregnant employee was laid off one day after she started her maternity leave. She alleged that the employer's reasons were pretext for discrimination. The trial court disagreed and granted summary judgment to the employer, a home builder. The court took into consideration the impact the economy has had on the home building industry and found the employer's reasons to be valid. The court reiterated that the FMLA does not give employees any special claim to employment that would have ended if the employee had not taken FMLA leave. Even though the time between the FMLA leave and layoff was close, the employee failed to show that there was a causal connection between the two and was unable to disprove the employer's reasons for the layoff. Doucett v. D.R. Horton Inc., No. 08-826 (D.N.M. 2010)

*Disabilities*

**Workplace Injury Leaves Employee Unable to Perform Essential Functions of Job**

An assistant restaurant manager's injury left her unable to lift more than 5 pounds. She was discharged after her leave expired because she was no longer able to perform manual tasks and the essential job of lifting required in her job description. To establish that she was a "qualified individual with a disability," the manager needed to show that she could perform the essential job functions with or without reasonable accommodation. Because the injury occurred due to heavy lifting at work, she was unable to demonstrate that she was a qualified individual protected by the Americans with Disabilities Act. *Richardson v. Friendly Ice Cream Corp.,* No. 08-2423 (1st Cir. 2010)

*Discrimination*

**Failure to Promote Excused**

A firefighter was rejected for promotion by the chief. Even before posting the sign-up sheet for the promotion, the firefighter told the chief that he soon would be leaving the Department. The chief concluded that the firefighter would not be dedicated and committed to the Department over the long haul and decided against considering him for the promotion. Although the firefighter admitted he was getting too old to fight fires, he stated he still wanted to work for the department. The firefighter denied stating he was planning to retire soon. The court said, "although Chief Bell may have been mistaken in the conclusions drawn from Mr. Stockwell's statements, '[a] reason honestly described but poorly founded is not a pretext, as that term is used in the law of discrimination.'" The court held that, the Fire Chief, had set forth legitimate, nondiscriminatory reasons for declining to promote Mr. Stockwell. *Stockwell v. City of Harvey,* No. 09-2355 (7th Cir. 2010).



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## New Wage Theft Ordinance in Miami-Dade

The Miami-Dade Board of County Commissioners passed a wage theft ordinance on February 18, 2010, that will permit an independent cause of action against employers who fail to pay or under pay employees. The ordinance applies to private sector employers in Miami-Dade. Independent contractors are not included as employees. The County is expecting 16 complaints a day. The minimum amount that can be brought before the County is $60.00. Liquidated damages at two times the unpaid wages will be assessed. The ordinance can be accessed at: http://op.bna.com/dlrcases.nsf/r?Open=vros-82wuda



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