Workplace Notes

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Firing in the Zone of Interests

Suppose that you are an employer (of 15 or more), and you receive notice that one of your employees (we'll call her "Miriam") has filed a sex discrimination charge against you with the Equal Employment Opportunity Commission. Suppose further that Miriam is engaged to be married to another employee "Eric," whose job performance has been a problem for many months. If you fire Eric, will you be vulnerable to a claim that you fired him in retaliation for Miriam's actions? Could Eric even bring such a claim, in view of the fact that he wasn't the one who made the sex discrimination complaint?

These were the questions that confronted the employer and U.S. Supreme Court in the case of *Thompson v. North American Stainless, LP*, decided on January 24, 2011 [Read the decision here: www.supremecourt.gov/opinions/10pdf/09-291.pdf]. Title VII of the Civil Rights Act of 1964, our principal statute prohibiting discrimination in employment, provides in part that employers may not "discriminate against any … employee … because he has made a charge" of discrimination under Title VII. This is usually referred to as the "antiretaliation" provision. It's easy to see that if Miriam were fired, she would be able at least to assert a claim for retaliation, and could prevail if she could show that she was fired for making her complaint. And it's almost as easy to see that an employee who complains or reports that *someone else* has been a victim of discrimination, and is then fired, could prevail on a claim for retaliation if he can show that he was fired for making the complaint or report.

But Eric's situation is far less obvious. He didn't make a complaint or report that he or anyone else had been a victim of discrimination, so he can't say that the employer has discriminated against him because he made a complaint. His claim is that he was fired because of his relationship to Miriam, who made a complaint; essentially, he contends that the employer fired him to get back at Miriam.

Eric will have his day in court. In a unanimous decision, the Supreme Court held that retaliation claims may be brought by persons within the "zone of interests" that the antiretaliation statutes seek to protect. A fiancé is within that zone of interests, because Miriam might have been dissuaded from making her claim if she knew that Eric would be fired as a result. And he was not (he claimed) harmed just by accident; indeed, his claim was that his employer fired him in order to punish Miriam.

It's important to note that Eric hasn't won his case yet. He still has to prove that his firing was retaliatory, and his employer can defend on the ground that the decision had nothing to do with Miriam's complaint, but was entirely performance-based.

continued >

Save the Date

Labor & Employment Seminar:
Employment Law for the Real World

DATE May 20, 2011

TIME 8:00 a.m.–1:30 p.m.
including breakfast and lunch

LOCATION The Hartford Club

KEYNOTE SPEAKER Dennis Murphy
Deputy Commissioner
CT Department of Labor

Employers today are faced with the unenviable task of complying with increasingly complicated and interconnected laws that can confuse even the most well-versed professional or seasoned executive. Pullman & Comley's Labor & Employment Law Section presents a program to cut through the complexities and address real-world issues that businesses in Connecticut face today. We will bring you up-to-date on the latest changes from courts, legislatures and agencies and provide insights into the impact of these laws on your business. Ultimately, attendees will be provided with useful and practical strategies to bring back to their organizations to implement necessary changes.

If you would like to receive more information about this event, please send your contact information to seminar@pullcom.com.

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The decision leaves some interesting questions open for future cases. A fiancé or family member is within the "zone of interests," but what about a good friend? How about a golfing buddy? It seems likely that future decisions will relate this issue to the employer's motivation for the discharge; that is, if the firing decision doesn't stand on its own merits, but was made because another employee complained about discrimination of some kind, the person fired will have a right to sue for retaliation.

The Supreme Court's unanimity is probably a signal that this wasn't really a difficult or groundbreaking case. This Court has shown before that it takes a broad view of the protection provided to employees by the antiretaliation provisions of our employment discrimination laws. This new decision comes almost exactly two years after another unanimous decision, *Crawford v. Metropolitan Government of Nashville and Davidson County*, holding that an employee who cooperated with an internal sexual harassment investigation and was then fired could bring a claim for retaliation. And in 2006, in *Burlington Northern and Santa Fe Railway Company v. White*, the Court held (again unanimously) that the antiretaliation provision of Title VII forbids not only employer conduct related directly to the terms and conditions of employment (such as a demotion, pay cut, or discharge), but any conduct or action that might dissuade a reasonable employee from reporting or complaining about discrimination (such as, in the case of Ms. White, assignment to less desirable duties without demotion or pay reduction).

In a unanimous decision, the Supreme Court held that retaliation claims may be brought by persons within the "zone of interests" that the antiretaliation statutes seek to protect.

The lesson here for employers is a familiar one – before taking action against any employee, it is essential to have thorough documentation or other evidence that the action is taken because of the employee's performance, economic necessity, or some other reason legitimately related to the needs of the business, and not for a discriminatory or retaliatory reason.

For more information, please contact Jonathan B. Orleans at 203.330.2129 or by email at jborleans@pullcom.com.

Cat's Paw Discrimination Case, with a Footnote

On March 1, 2011, the U.S. Supreme Court, in a unanimous 8-0 decision (Justice Kagan recused herself), broadened the methods that an employee can use to prove a discrimination case. The case, *Staub v. Proctor Hospital*, will likely have significant implications for employers and may make it more likely that courts will reject employers' summary judgment motions.

At issue in *Staub* is the so-called "Cat's Paw" theory of discrimination, in which the adverse employment action (like a firing) by a "clean" upper-level executive is alleged to have been infected by a lower-level supervisor who had discriminatory (in this case, anti-military) animus.

In the majority opinion, Justice Scalia notes the delicate issues in play, namely whether such influence by a supervisor is enough of a "motivating factor" to cause an employer to be liable:

> The central difficulty in this case is construing the phrase 'motivating factor in the employer's action.' When the company official who makes the decision to take an adverse employment action is personally acting out of hostility to the employee's membership in or obligation to a uniformed service, a motivating factor obviously exists. The problem we confront arises when that official has no discriminatory animus but is influenced by previous company action that is the product of a like animus in someone else.

But ultimately, the court seemed unconcerned that it was not creating blanket protection for employers who terminated employees after conducting an investigation. The court said that because a supervisor is an agent of the employer, the employer should be responsible when that

supervisor "causes" an adverse employment action, much like sexual harassment cases:

> We therefore hold that if a supervisor performs an act motivated by anti-military animus that is intended by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable under USERRA.

But perhaps to satisfy critics, Justice Scalia dropped an interesting footnote that suggests that there are limits to such liability. In footnote four, he notes:

> Needless to say the employer would be liable only when the supervisor acts within the scope of his employment or when the supervisor acts outside the scope of his employment and liability would be imputed to the employer under traditional agency principles …. We express no view as to whether the employer would be liable if a co-worker, rather than a supervisor, committed a discriminatory act that influenced the ultimate employment decision.

While the case is applied in the context of USERRA (discrimination against some service members), the language is similar to Title VII, and thus employers should expect such logic to be applied to those cases too. ADEA cases may be treated differently.

For employers nationwide, the case is probably the most significant of this year's Court term.

For employers nationwide, the case is probably the most significant of this year's Court term and we can certainly expect to see this theory come up time and again. Employers in Connecticut, however, already have had to deal with this theory, so its impact may be a bit more muted. Regardless, this case is a must-read for employers and suggests that training of front-line supervisors is as critical as ever.

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Famous Finley Footnote

One of the most fundamental employment practices in Connecticut derives from a footnote in a case decided by the Connecticut Supreme Court in 1987.

Thomas Finley sued his former employer, Aetna Life and Casualty Company, for wrongful termination of employment, claiming that he had been informed through the company's personnel manual that he could not be terminated from employment as long as his performance was satisfactory. The Connecticut Supreme Court ruled that a personnel manual could in fact form the basis of a contract between the employer and an employee. But in footnote number five to this decision, the Court wrote:

> The brief of … amicus curiae expresses the fear that the … decision in this regard will make every termination a potential jury trial. This fear is unfounded. By eschewing language that could reasonably be construed as a basis for a contractual promise, or by including appropriate disclaimers of the intention to contract, employers can protect themselves against employee contract claims based on statements made in personnel manuals.
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> *Finley v. Aetna Life and Casualty Co.*, 202 Conn. 190 (1987).

Based on the *Finley* footnote, later court cases routinely rejected claims of an implied contract arising from a personnel manual or employee handbook as long as there were conspicuous disclaimers that the manual was not a contract and that the employment relationship was employment at will. This is important to employers because it means that lawsuits based on contract claims will be dismissed upon motion at an early stage, rather than proceed to a jury trial where the jury's sympathies might very well be with the terminated employee.

Personnel manuals or employee handbooks are generally considered to be a useful management technique. Since the *Finley* decision, a contract disclaimer has presumably been included in the handbooks and manuals of all

Connecticut employers. But like many things that become routine, it is helpful to revisit them occasionally to be sure that they accomplish their intended purpose.

Is the disclaimer relatively conspicuous in the employee handbook, stated at the beginning and with an appropriate heading? Does the disclaimer say that it applies to any subsequent revision of the handbook, and has it been in fact incorporated in any revisions? Does the disclaimer indicate that it cannot be revised or revoked by any verbal statements of managers and supervisors? Does the handbook state that it can be modified at any time without prior notice? Is the contract disclaimer also included on the employment application? Do employees sign a receipt for the handbook, and, if so, does the receipt indicate that the handbook is not a contract?

Like many things that become routine, it is helpful to revisit employee manuals occasionally to be sure that they accomplish their intended purpose.

Although the *Finley* footnote actually offered two options — eschewing language that could reasonably be construed as a basis for a contractual promise, or including appropriate disclaimers of the intention to contract — in practice, most employers do not rely on their ability to say that they avoided contractual-type language. A specific disclaimer is typically included in all personnel manuals and employee handbooks, and some employers even put disclaimer statements and at-will employment statements in letters offering employment.

It would be an easy and worthwhile exercise to obtain a legal review of the contract disclaimers in personnel manuals, employee handbooks and other employment documentation, especially if they were drafted initially without legal input, to be sure that the disclaimers accomplish their intended purpose.

For more information, please contact Michael N. LaVelle at 203.330.2112 or by email at mlavelle@pullcom.com.

More Increases in Wage and Hour Enforcement on the Way

In a sign that the recent ramp-up in wage and hour enforcement is set to continue, the U.S. Department of Labor's Wage and Hour Division announced last month that it is seeking a five percent increase in its budget for fiscal year 2012, with the specific goal of hiring more than 100 new full-time staff members to support its employee misclassification initiatives. This increase comes on the heels of more than 250 new hires by the same agency in 2009, and double-digit percentage increases in the number of wage and hour investigations and enforcement actions over the last several years. Given Connecticut's tough new law on the same subject and the recent launching of high-profile joint federal-state information sharing programs, it is clear that employers must take even more care than ever to reduce their exposure for inadvertent employee misclassification.

A brief overview of the penalties for such inadvertent misclassification brings the risk into stark focus. An employer found by the Internal Revenue Service to have unintentionally misclassified an employee as an independent contractor can be liable for, among other things:

- 100 percent of the employer's share of the FICA contributions for the sums that should have been paid to the employee as wages;
- 20 percent of the *employee's* share of the FICA contributions;
- 1.5 percent of the wage amount, as a penalty for not withholding income taxes; and
- 100 percent of the federal unemployment tax.

These figures assume the employer has issued a Form 1099 for the payments to the employee. Several of the categories listed above double when the employer fails to file such an informational return. In either event, these sums are true penalties, not a shift in the tax responsibility from employee back to employer. That is, "the employee's liability for tax shall not be affected by the assessment or collection of the tax so determined," and "the employer

shall not be entitled to recover from the employee any tax so determined." 26 USC Sec. 3509 (d).

When combined with a new penalty of $300 per day of misclassification under Connecticut law (as opposed to the former penalty of $300 per violation), it is easy to see how even brief and accidental misclassification of a handful of employees can become a very expensive proposition.

Needless to say, sanctions for intentional misclassification are even more draconian. Not only are there extra layers of monetary penalties, but there are situations where a business owner or officer can be held personally liable for some of the sums, and even potential felony criminal exposure under Connecticut law.

In light of the still-increasing enforcement activity in this area, and the correspondingly greater risk of exposure to harsh penalties for even unintentional misclassification, vigilance on the part of employers is called for. Those taking on new hires as the economy begins to recover should be cautious in how they classify those workers, and every employer should be willing to take a fresh look at its existing classification arrangements.

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