Employment Law - What's in Store for 2011

Many employers faced challenges in 2010 related to the economy. These challenges often involved personnel issues, including workforce reductions. With unemployment still a serious problem heading into 2011, terminated employees are less likely to find new employment opportunities and may be more inclined to claim they were terminated for illegal reasons. This article looks at three decisions the Supreme Court will be addressing this year that involve wrongful discharge claims. Regardless of the outcome, these cases underscore the importance of carefully considering all adverse employment decisions.

Additionally, this article will briefly address the new regulations and a step employers can take to protect themselves against violations of the Genetic Information Nondiscrimination Act (GINA).

Supreme Court Decisions on the Horizon

Oral complaints – are they protected under the FLSA's anti-retaliation provision?

The Fair Labor Standards Act (FLSA), which provides minimum wage and overtime protections to employees, also provides protection from retaliation against employees who file a complaint alleging FLSA violations. In *Kasten v. Saint-Gobain Performance Plastics Corp*, the Supreme Court will decide if an oral complaint satisfies the FLSA provision that protects employees against retaliation because the employee "has filed any complaint."

Kevin Kasten worked for Saint-Goban Performance Plastics and was required to use a time card to swipe in and out of an on-site time clock. Kasten was disciplined on four separate occasions for violations of the time card policy. Discipline for the infractions was progressive and eventually resulted in his termination. Kasten alleges that before the third infraction and thereafter, he verbally complained to his supervisor and Human Resource personnel that the location of the time clock was illegal. He claims that he was terminated in retaliation for his verbal complaints that the location of the time clock violated the FLSA.

The lower courts are split on the issue of whether an oral complaint satisfies the "has filed any complaint" threshold. The Supreme Court will resolve this discrepancy between the various federal circuits.

Retaliation against a third party – is it protected?

Title VII, which prohibits discrimination based upon protected characteristics (sex, race, etc.), also prohibits retaliation against an employee who "has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing." In *Thompson v North American Stainless*, the Supreme Court will decide if a third party to the charge is also protected from retaliation.

Eric Thompson worked for North American Stainless as a metallurgical engineer. He was engaged to a co-worker. The co-worker/fiancée filed a complaint with the EEOC alleging that she was discriminated against because of her gender. Three weeks after the EEOC notified North American of the complaint, Thompson was terminated. He alleges that he was terminated in retaliation for his fiancée's EEOC charge.

The 6th Circuit Court of Appeals (which includes Michigan) ruled for the employer, stating that the anti-retaliation provision is "limited to persons who have personally engaged in protected activity." The Supreme Court will decide whether to uphold that decision or whether to extend anti-retaliation protections to third parties who did not personally engage in protected activities.

Influence over decision maker – when does it become illegal?

The Uniformed Services Employment and Reemployment Rights Act (USERRA) protects employees from discrimination based upon their military service. In *Staub v Proctor Hospital*, the Supreme Court will decide under what circumstances an employer may be held liable based upon the discriminatory bias of someone who influenced the ultimate decision maker, but who did not make the employment decision at issue.

Vincent Staub worked for Proctor Hospital as an angiopraphy technologist. He was also an army reservist and therefore was unavailable for work one weekend a month and for two weeks during the summer. One of his supervisors, the second in command in Staub's department and the person responsible for preparing the work schedules, frequently expressed anti-military bias and was openly displeased about having to accommodate Staub's schedule. Staub was disciplined by the supervisor for reasons unrelated to his military service and he was ultimately terminated based upon that discipline. While the decision to terminate Staub was made by Human Resources, Staub alleged that the decision was actually the result of the supervisor's anti-military bias.

A jury found in favor of Staub, a decision that was overturned by the 7th Circuit Court of Appeals. The Supreme Court has agreed to decide under what conditions an employer can be held liable for the bias of a person who influenced or caused an adverse employment action – but who did not actually make the decision. A ruling in favor of the employee could have far reaching implications for employers as the rationale would likely apply to other statutes that prohibit discrimination.

Genetic Information Nondiscrimination Act (GINA) Regulations

On November 9, 2010, the Department of Labor issued the final regulations that interpret and implement GINA. The regulations take effect on January 10, 2011. GINA, which went into effect on November 21, 2009 and applies to employers with 15 or more employees, prohibits the use of genetic information in making employment decisions, restricts acquisition of genetic information by employers, and strictly limits the disclosure of genetic information. Genetic information includes (1) an individual's genetic tests, (2) genetic tests of family members, (3) family medical history, (4) genetic services and/or (5) genetic information of a fetus carried by an individual or a family member. While the use and disclosure of genetic information is under the control of the employer, situations may arise where an employer inadvertently acquires genetic information about an employee. For example, an FMLA health certification from a healthcare provider may inadvertently provide the employer with genetic information about the employee. The final regulations acknowledge this dilemma and provide a "safe harbor" for employers who inadvertently acquire such information.

In order for the acquisition of genetic information to be considered inadvertent, the employer must direct the individual or healthcare provider from whom it is requesting medical information not to provide genetic information. The final regulations provide a sample notice that an employer can use to satisfy the requirement. The final regulations can be found at http://www.gpo.gov/fdsys/pkg/FR-2010-11-09/pdf/2010-28011.pdf and the sample notice can be found at section 1635.8(b)(1)(i)(B).

Bottom Line

Employees suffering adverse employment consequences are finding creative ways of expanding their protections. Employers should exercise due diligence in all employment decisions.

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