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# Employment Issues – The Current Reality (Part 1)

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# Current Developments in Employment Law

- The Supreme Court's Been Busy
- FMLA Regulations
- DOL is empowered: Fair Labor Standards Act enforcement
- National Labor Relations Act

# Retaliation: A Love Story



# Retaliation: A Love Story



- Boy meets girl (at the workplace)
- They fall in love and get engaged
- Everybody knows!

# Workplace Romance

- Girl files EEOC Charge of discrimination
- Three weeks later, Company fires boy!
- He brings a retaliation lawsuit under Title VII



# Retaliation

- **Employer**: He did not engage in any protected activity
- Employer wins!

# Is it Retaliation?

- Retaliation is not limited to discriminatory actions that affect the terms and conditions of employment. (*Burlington Northern*)
- The employer's actions might well have dissuaded a reasonable worker from making or supporting a charge of discrimination.

# Retaliation

- “We think it obvious that a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiance would be fired.”





# Unanswered Question

- Where is the line drawn?
- **Supreme Court**: “We expect that firing a close family member will almost always meet the standard, and inflicting a milder reprisal on a mere acquaintance will almost never do so, but beyond that we are reluctant to generalize.”



*Thompson v. North American Stainless, LP*, 131 S. Ct. 863 (2011).

# Retaliation

- **But, who gets to be the plaintiff?**
- **“A civil action may be brought . . . by the person claiming to be aggrieved.”**
- **The terminated employee falls within the “zone of interests” designed to be protected by Title VII**

*Thompson v. North American Stainless, LP*, 131 S. Ct. 863 (2011).

# Protected Activity: *Speaking Out Under the FLSA*

- Discharge or in any other manner discriminate against an employee because employee has filed any complaint . . .
  - **To government?**
  - **Must be in writing?**



# Protected Activity: *Speaking Out Under the FLSA*

- Employee tells supervisor and HR: location of time clock was illegal – prevented employees from being paid for time spent putting on and taking off protective gear



# Adverse Action?

- Case dismissed by trial court and 7<sup>th</sup> Circuit Court of Appeals
- US Supreme Court reversed; *Kasten v. Saint-Gobain Performance Plastics Corp.* (March 22, 2011)
- Employer: Be more lenient since carries criminal penalties
- Court: Disadvantage those with difficulty making requests in writing; prevent employers from using hotlines, interviews and other oral methods of receiving complaint in order to avoid claims.
  - Didn't address if need to be file with government

# Practical Suggestions



- Retaliation claims continue to dominate the employment landscape
- The warning signs of potential retaliation claims may be subtle
- Management training is critical
- Add retaliation to EEO and other policies

***The Military Meets  
The Cat's Paw!***



# In the Line of Duty

- Hospital technician is in the military reserves
- Military service: one weekend per month, two weeks per year





# In the Line of Duty

- Supervisor called military duties "bull\*\*\*\*."
- Supervisor assigned EE extra shifts, "to compensate for everyone else having to bend over backwards to cover his schedule for the Reserves."



# In the Line of Duty

- His supervisor's supervisor characterized the reservist's drill weekends as "Army Reserve bull\*\*\*\*" and a "waste of taxpayers' money."



# The End of the Line

- Work performance problems are documented – given corrective action memo
- Violates the terms of the memo
- HR Vice President investigates



# The End of the Line

- HR conducts investigation, including talking to co-worker
- HR alone makes the decision to terminate
  - Undisputed that HR did not in any way consider military service.



# “Independent” Decision?

- Employee claims discrimination under USERRA
- Employee wins at trial
- Court of Appeal reverses
  - Test: Did biased non-decisionmaker exercise singular influence? Was decision product of blind reliance?
  - Here: decisionmaker not wholly dependent on single source of information; conducted own investigation (co-worker and personnel file)

# The Cat's Paw Strikes!

- U.S. Supreme Court: Bias of supervisors could have influenced termination
- Test is whether underlying supervisor's bias was a "motivating factor"
- *Staub v. Proctor Hospital*, 131 S. Ct. 1186 (2011).

# How do you stay out of the litter box?

- “Independent” investigation must be thorough --  
Follow Up!
- Double check critical employment decisions to be sure that they are not “tainted” by possible bias of others who are not decision makers
- When documenting employment actions, anticipate cat’s paw claims



THANK YOU

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