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

• 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.”
• 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."

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

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 7th 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”

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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