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A legal update from Dechert's Labor and Employment Group

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U.S. Supreme Court Adopts Broad Reading of Title VII's Anti-Retaliation Provision

In a recent decision, the Supreme Court ruled that an employee or job applicant may successfully sue an employer under the anti-retaliation provision of Title VII of the Civil Rights Act of 1964 for actions that are not related to the terms of employment, or occur outside the workplace, as long as those actions are "harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination," resolving a split among the federal courts of appeal and handing employees a victory. *Burlington Northern & Santa Fe Railway Co. v. White*, No. 05-259, 2006 WL 1698953 (U.S. June 22, 2006).

The case involved Sheila White, a track laborer at Burlington Northern & Santa Fe Railway Company assigned to operate the forklift. After Ms. White complained to Burlington officials about insulting and inappropriate comments made to her by her immediate supervisor in front of her male colleagues, including repeated assertions that women should not be working in the department to which Ms. White was assigned, Ms. White was reassigned to less desirable, dirtier tasks associated with her position as a track laborer.

In reassigning Ms. White, her supervisor commented that other employees complained that forklift duty should be reserved for a "more senior man." Ms. White filed a charge with the Equal Employment Opportunity Commission (EEOC). She subsequently filed two other charges with the EEOC alleging retaliation based on her employer's monitoring of her, and a thirty-seven-day suspension without pay for insubordination, which was later found to be meritless and resulted in Ms. White's reinstatement with back pay.

Substantively, Title VII is aimed at eradicating employment discrimination based on race, color, religion, sex, or national origin. Title VII's anti-retaliation provision secures this substantive goal by preventing an employer from retaliating against an employee for his or her efforts to enforce Title VII. Comparing the language and purpose of Title VII's substantive discrimination provision and anti-retaliation provision, the Court concluded that, unlike the substantive provision, the anti-retaliation provision can be triggered by actions outside the workplace, but cautioned that these actions must be "material," meaning that a reasonable worker may have been dissuaded from making or supporting a charge of discrimination, rather than "those petty slights or minor annoyances that often take place at work and that all employees experience."

In a separate concurrence, however, Justice Alito argued that reading the two provisions together, the protections afforded by the anti-retaliation provision should be limited to materially adverse actions affecting the terms and conditions of employment. Justice Alito also criticized the majority's test of whether a reasonable worker might be dissuaded as unclear in that it allows consideration of at least some individual characteristics of the employee alleging retaliation.

Following this decision adopting a broad reading of the scope of Title VII's anti-retaliation provision, employers must be vigilant to ensure that employees take no action that objectively retaliates against an employee alleging a violation of Title VII, whether or not these objectively retaliatory actions are aimed at the terms or conditions of employment or actually occur in the workplace. As in *White* itself, this retaliation could include assigning an employee to less favorable job responsibilities, even if these less favorable responsibilities are part of the formal job description of the employee's job title, or taking disciplinary

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action such as suspension, even if any direct economic harm resulting from the discipline is later remedied. ■

DOL Review Board Issues Important Sarbanes-Oxley Ruling

On May 31, 2006, the Labor Department's Administrative Review Board in *Klopfenstein v. PCC Flow Techs. Holdings, Inc.*, DOL ARB, No. 04-149, overruled the findings of an administrative law judge and reinstated the claims of an executive of a private subsidiary of a public company. In the course of the Board's opinion, it offered significant guidance on determining liability, the scope of activity protected by the Sarbanes-Oxley Act ("SOX"), and the complainant's burden of proof. The opinion is likely to have a significant impact on how SOX cases are decided.

The Claimant was a vice president of a limited partnership owned by the Respondent. The Respondent was owned by a publicly traded corporation. In late 2002, the Claimant discovered what he believed were problems related to the recording of inventory. He did not believe that the error was fraud, and was concerned that the discrepancies might lead the company to overstate its assets. The Claimant believed that correcting the error would materially affect the company's income. He reported his concerns first to several people, including the finance department, and later to managers through reports that he prepared for weekly meetings.

In February of 2003, an employee of the parent company was assigned to investigate the discrepancies. During the same period that he was complaining about the alleged errors, Claimant was investigated for falsifying documents and was terminated in March 2003. Claimant then filed a complaint against his employer and the vice president of finance alleging retaliation in violation of SOX. However, he did not name the publicly traded company as a respondent.

The administrative law judge found that SOX did not protect Claimant as the employee of a private company. Because Claimant had not named the publicly traded parent company as a respondent, the administrative law judge dismissed the case. Upon review, the Board disagreed and reversed the administrative law judge's decision and in the process provided guidance about three issues.

First, the Board held that the administrative law judge must apply the general common law standards of agency as articulated in the Restatement of Agency when determining whether the officers of a private company were acting on behalf of a publicly held parent company and may be held liable under SOX. SOX applies equally to any public company or any "agent of such company." Based on facts such as the overlapping officers and the involvement of the parent corporation in the subsidiary's affairs, the Board strongly suggested that Respondent was an agent of the public company and that Claimant was protected by SOX.

Second, the Board expanded the definition of activity protected by SOX. The Board made it clear that complaining about not only fraud, but also any other violation of an SEC rule or regulation, was a protected activity even if it was not the first such complaint. Moreover, the complaint need not be particularly specific. Instead, if the complaint is sufficient to suggest that the Claimant could have believed that there was a violation of some regulation within SOX's scope, then the complaint would constitute protected activity.

Third, the Board clarified Claimant's burden. Claimant must only show that the protected activity was a "contributing factor" in the decision to terminate. The administrative law judge had applied a more demanding standard. Further, Claimant does not need to demonstrate that the respondent's proffered reasons for the termination are a pretext.

The Board's decision clarifies the standards to be applied by administrative law judges and also makes it easier for claimant's to prevail. Private employers which are subsidiaries of publicly held companies, in particular, will now have to be more cognizant of SOX and possible whistleblower claims. Similarly, all employers subject to SOX will have to be particularly sensitive to the broad nature of claims that may be protected by SOX and be mindful of how employees who have raised concerns are treated. ■

Third Circuit Makes it Difficult for Employers to Win Summary Judgment on ADA Claims

Employers often search for ways to minimize injuries to workers and to increase productivity. For example, The Hershey Company adopted a work rotation system designed to protect all workers from repetitive stress injuries. However, a disabled employee complained about the rotation system and then declared herself unable to perform her job and filed for disability benefits. The Third Circuit Court recently reversed the District Court's dismissal of the employee's ADA claim, finding that plaintiff's admissions that she was totally disabled did not

render her unqualified for the job, and participation in the rotation system was not an essential job function.

In *Turner v. Hershey Chocolate USA*, 440 F. 3d 604 (3rd Cir. March 20, 2006) (PA), the plaintiff claimed that Hershey had failed to provide a reasonable accommodation for her disability. Plaintiff had multiple medical problems and there is little doubt that she was disabled. After returning from a medical leave of absence, she was assigned to a light duty area that included three production lines for chocolate-covered mint patties.

All three lines performed the same function, but one of the lines required the assigned employee to stand, bend, and twist. The other lines allowed the assigned employee to sit. Her doctor carefully reviewed film footage of the work that plaintiff would be required to perform on the "standing line" and cleared her to do the work. However, after returning to work, plaintiff complained that she was in pain and preferred to be on one of the other two lines. Hershey accommodated her request and reassigned her to one of the "sitting lines."

After several years had passed, Hershey noticed increased repetitive stress injuries for employees assigned to plaintiff's work area. The plant nurse, manager, and supervisor came up with a solution that would reduce the risk of these injuries: a rotation system. Employees would rotate between all three lines during a work day. This would allow them to use both hands equally and to alternate between sitting and standing.

Plaintiff objected to the rotation system and asked to be exempted from it. She then submitted a more restrictive letter from her doctor stating that she was not permitted to do any bending, twisting, or heavy lifting. Hershey decided that plaintiff was no longer able to continue in her position because it believed that the rotation system was necessary to prevent injuries to all of the workers.

Plaintiff applied for disability stating that she was unable to do her regular job and unable to work in any job in the entire plant. She then filed a lawsuit against her employer alleging that they had failed to offer her a reasonable accommodation—namely, exemption from the "standing line" in the rotation system. The District Court granted summary judgment against the plaintiff. The United States Court of Appeals for the Third Circuit reversed.

The Third Circuit considered three arguments on behalf of Hershey. First, Hershey argued that the plaintiff was bound by her admissions in her disability applications that she could not work and was therefore not entitled to relief. The Court rejected this argument. In spite of the plaintiff's rather explicit admissions, the Court found that the admissions were not a bar to her current claim because the admissions did not address whether or not plaintiff could work with an accommodation of some sort. Rather, the admissions were limited to describing plaintiff's situation without any accommodation.

Second, Hershey argued that plaintiff was not qualified for the job because she could not perform an essential function of the job—rotation. The Court quickly rejected this argument. When considering the argument, the Court provided a list of factors to consider when determining whether an activity is an essential job function. The factors include: written job descriptions; the amount of time spent on the activity; consequences of not requiring the activity; whether the position exists to perform that function; and whether the employee was hired to perform that function.

In this case, the Court found that the rotation activity took only a small amount of time and was not critical to the performance of the job. The Court went further and reminded the district courts of its advice to avoid engaging in factual determinations like whether an activity is an essential job function and to leave such matters to a jury. Given this instruction, it will be difficult for employers to ever prevail on an essential job function argument regardless of its intuitive appeal at the summary judgment stage.

Third, Hershey argued that the requested accommodation was unreasonable because it would undermine the safety of all the workers. But the Court found that plaintiff's proposal that she rotate between the two "sitting lines" was both practical and possible. Further, the Court found little evidence to support either Hershey's claim that the rotation scheme was essential for health and safety reasons or that the prior practices posed some safety risk. The Court acknowledged that Hershey's safety argument might prevail at trial, however, based on the existing record, there was enough of a fact dispute to warrant sending the claim to a jury. ■

NLRB Holds that Notes of Confidential Witness Interviews Need Not Be Produced in Response to Union's Requests for Information

The National Labor Relations Board recently concluded that, in certain circumstances, an employer is justified in refusing to disclose notes of confidential witness interviews in connection with the processing of union griev-

ances. In a 2-1 decision, the Board in *Northern Indiana Public Service Company*, Case 25-CA-28040-1 (May 31, 2006), held that the confidentiality interests of the Northern Indiana Public Service Company (NIPSCO) trumped the United Steelworkers of America's need for access to notes of interviews conducted in response to an employee's complaint of threats of workplace violence by a supervisor. In reaching this conclusion, the majority relied heavily upon the fact that NIPSCO had provided assurances of confidentiality to the employees interviewed as part of the company's investigation.

The case arose after an employee, Randy Chaplin, complained to his union representative that his supervisor had threatened him with physical violence. When the union brought the alleged incident to NIPSCO's attention, the company began an internal investigation. As part of the investigation, NIPSCO's labor relations coordinator conducted interviews of several employees, each of whom was told that the interviews would be kept strictly confidential.

After the union filed a grievance alleging that NIPSCO had violated its contractual duty to provide a safe workplace for employees, it requested information regarding NIPSCO's investigation of Chaplin's allegations. In response, NIPSCO provided the union with the names of the employees who were interviewed as part of the investigation, but refused to provide its manager's notes of those interviews, citing confidentiality.

The union filed an unfair labor practice charge and the administrative law judge who heard the case sided with the union. The majority of the panel hearing the case, consisting of Chairman Battista and Member Schaumber, began its evaluation of the judge's decision by noting that a party may refuse to disclose confidential information in a collective bargaining relationship only where:

- The party has a "legitimate and substantial" confidentiality interest in the information sought
- The party's confidentiality interest outweighs the requesting party's need for the information
- No accommodation that would provide the requestor with the information it needs while maintaining confidentiality can be reached

The Board went on to find in favor of NIPSCO, relying heavily on the promises of confidentiality made to the interviewed employees: "[W]e believe that a promise of confidentiality is a reasonable and lawful step in securing information about alleged misconduct. . . . Thus, contrary to the assertion of our dissenting colleague, a promise of confidentiality is relevant to the issue of whether the information will be considered confidential."

Member Liebman dissented, stating that "[E]ven assuming NIPSCO has a confidentiality interest, the balance between the Union's need for information and NIPSCO's nondisclosure favors the Union."

In conclusion, the Board's decision continues a recent trend protecting employer confidentiality interests in internal investigations. However, there remain a number of open issues in this area, including the extent to which the Board's rule will be limited to cases involving threats of violence or other workplace safety issues, and the extent to which an employer's promises of confidentiality to interviewed employees will continue to be the primary factor in determining whether information must be disclosed.

Thus, employers responding to employee complaints should take care to:

- Explicitly assure individuals being interviewed as part of an internal investigation that their statements will be kept strictly confidential
- Offer to work with the union to reach an accommodation that allows the union access to some of the information it needs while protecting the employer's legitimate confidentiality interests ■

OFCCP Issues Standards on Systemic Compensation Discrimination

The U.S. Department of Labor, Office of Federal Contract Compliance Programs ("OFCCP"), recently published final interpretive standards for the agency's review and determination of systemic compensation discrimination under Executive Order 11246 (71 F.R. 35124), and final voluntary guidelines for contractors' self-evaluation of their pay practices (71 F.R. 35114). OFCCP based their development on Title VII precedent.

Evaluating Contractors' Pay Systems

The new standards will govern OFCCP's investigation (under a pattern or practice theory of disparate treatment) and issuance of any related Notice of Violations. When investigating, the agency will aim to include in regression analyses at least 80% of the audit universe. Ordinarily, a finding of discrimination will be made only where a statistically significant compensation disparity (at the two standard deviation level) is found using a mul-

tiple regression analysis that compares "similarly situated" employees and controls for legitimate factors used by the employer in making pay decisions, and the statistical outcome is supported by anecdotal evidence of discrimination. Of course, OFCCP will assert a violation wherever there is direct evidence of discriminatory intent.

When grouping employees for comparison, OFCCP will rely on Title VII's "similarly situated" standard. Only those employees actually similar with respect to the work they perform, their responsibility level, and the skills and qualifications involved in their positions will be grouped together.

Because factors which influence pay often do not have the same effect on pay in all categories/levels of jobs in a workforce, OFCCP intends to either perform a separate regression for each group of similarly situated employees, properly controlling for the appropriate factors, or perform a "pooled" regression with appropriate interaction terms. Distinct, similarly situated groups will be pooled for regression only where required because of small size. When using a pooled regression, OFCCP will conduct an appropriate test (*e.g.*, Chow) to determine which interaction terms must be included.

OFCCP will include the results of its regression(s) and a summary of anecdotal evidence in any Notice of Violations it issues. The agency promises to supply sufficient detail about its own regressions to permit replication of them.

Voluntary Self-Evaluation

Current OFCCP regulations at 41 C.F.R. 60-2.17(b)(3) require contractors to review their pay systems at least annually to ensure nondiscrimination. The agency's new voluntary guidelines provide instruction on self-evaluation methods preferred by OFCCP. While contractors remain free to choose their own techniques for evaluating pay systems, those who voluntarily meet the general standards outlined in the new guidelines will be assumed by OFCCP to be in compliance with Executive Order 11246.

The guidelines instruct contractors to divide their workforces into Similarly Situated Employee Groupings (SSEGs). An SSEG must be large enough for meaningful statistical analysis—that is, contain at least 30 employees and five or more members of either of the following pairs: male/female, or minority/non-minority. A contractor is expected to evaluate pay using some form of statistical analysis of SSEGs and non-statistical methods for employees not placed in an SSEG. If an establishment has at least 500 employees, multiple regression analyses must be performed. Where a contractor's statistical analysis does not encompass at least 70% of the establishment's employees, OFCCP will carefully scrutinize the contractor's methods.

If any contractor identifies a statistically-significant compensation disparity (at the two standard deviation from a zero disparity level) which cannot be explained by legitimate factors or is not otherwise the product of unlawful discrimination, the contractor must provide appropriate remedies. Adjustments based on current and prior disparities may be required (*i.e.*, OFCCP uses a two-year window for back pay.)

Contractors who comply with the voluntary guidelines, reasonably meet the guidelines' standards, and make all self-evaluation documents and data available to OFCCP during a review will be considered in compliance. As an alternative, a contractor who elects to assert attorney-client privilege over its documents/data will be permitted to certify compliance with the regulatory obligation to review its pay systems. Such a contractor will be subject to regular audit procedures and evaluated without regard to its self-evaluation. ■

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