DechertOnPoint

February 2011 / Issue 27

A legal update from Dechert's Labor and Employment Group

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## Supreme Court Holds That Adverse Action Against Complaining Employee's Fiancé Constitutes Retaliation Under Title VII

In a recent opinion, the Supreme Court unanimously (with Justice Kagan recusing herself and two justices filing a concurring opinion) concluded that Title VII prohibits retaliation against an employee who is closely related to another employee who exercises his or her statutory rights and that such affected employee has standing to sue under the statute. In *Thompson v. North American Stainless, LP*, the petitioner Eric Thompson, and his fiancée, Miriam Regalado, were both employees of North American Stainless. Regalado filed an EEOC charge against the company alleging sex discrimination. Three weeks later, the company fired Thompson. Thompson then filed his own charge and ultimately a lawsuit under Title VII, claiming that his firing was in retaliation for his fiancée's exercise of her statutory rights. The District Court granted summary judgment for the company, concluding that Title VII "does not permit third party retaliation claims." The Sixth Circuit en banc affirmed the District Court's ruling, finding that because Thompson did not himself engage in any protected activity, he was not within "the class of persons for whom Congress created a retaliation cause of action."

The Supreme Court reversed the Sixth Circuit in a majority opinion authored by Justice Scalia, finding, with "little difficulty," that Thompson's termination violated Title VII. Relying on its holding in *Burlington N. & S.F.R. Co. v. White*, 548 U.S. 53 (2006), that Title VII's anti-retaliation prohibition covers any employer action that "might have dissuaded a reasonable worker from making or supporting a charge of discrimination," the Court concluded that the firing of one's fiancé was covered by the provision. The Court stated: "We think it obvious that a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiancé would be fired." However, the Court declined to provide specific guidelines regarding which third parties are covered, noting only that a close family member would almost always qualify, while a mere acquaintance was unlikely to be protected. According to the Court, district courts will have to decide this issue based on the particular circumstances of the cases before them.

Having reached the conclusion that the termination constituted prohibited retaliation under Title VII, the Court then addressed what it considered to be the more difficult question: whether Thompson had standing to sue. Title VII provides that an action can be brought by "the person claiming to be aggrieved." The Court refused to conclude that this provision conferred a right to sue on all those who satisfy Article III standing requirements (i.e., anyone who could claim to have suffered any harm as a result of an employer's action), noting that this would lead to absurd results—for example, a shareholder could sue a company for firing a valuable employee based on his race if that termination led to a decrease in the value of the company's stock. Instead, the Court held that the term "aggrieved" in the statute had a narrower meaning in that it enabled suit by any person with an interest arguably protected by Title VII. This test would exclude plaintiffs who are technically injured under Article III but whose interests are unrelated to Title VII's purposes of prohibiting discrimination and retaliation. In this case, the Court held that Thompson was undeniably "within the zone of interests protected by Title VII" because Thompson, an employee, was fired as a means of harming Regalado, another employee, who had exercised her Title VII rights by filing an EEOC charge.

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*Thompson* continues the Court's recent expansion of the scope of anti-retaliation provisions in employment laws. While the Court's opinion focused on the specific language of Title VII in reaching what it described as an "obvious" result, the Court's willingness to broadly interpret the anti-retaliation prohibition in Title VII suggests that its conclusion is likely to impact other anti-discrimination laws as well.

## Fourth Circuit Joins Sister Circuits in Adopting Standards for Determining FLSA Overtime Compensation

In *Desmond v. PNGI Charles Town Gaming, L.L.C.*, (4th Cir. Jan. 14, 2011), the Fourth Circuit joined the list of circuit courts that have held that back pay for overtime hours worked by employees mistakenly classified as exempt should be calculated at 50% of the employee's regular rate of pay. The First, Fifth, Seventh, and Tenth Circuits had previously determined that a 50% overtime premium was appropriate in calculating unpaid overtime compensation due to misclassified employees.

The Fair Labor Standards Act ("FLSA") generally requires that employees be paid 150% of their regular rate for any hours worked in excess of 40 during a single workweek. Certain categories of employees, however, are exempted from the overtime provisions of the FLSA. The plaintiffs in *Desmond* were racing officials with Charles Town Gaming. Charles Town Gaming classified these employees as exempt pursuant to the FLSA's administrative employee exemption and paid them a fixed weekly salary. The fixed salary was paid regardless of the number of hours worked, which often exceeded 40 per week. The plaintiffs were terminated when they unanimously declared the wrong horse to have won a horse race.

The plaintiffs sued Charles Town Gaming, asserting that they were misclassified as exempt employees and should have received overtime compensation for hours worked over 40 in a workweek. The district court and, in a previous appeal, the Fourth Circuit agreed and granted summary judgment to the plaintiffs on liability. The district court then calculated the unpaid overtime compensation owed to each plaintiff by multiplying the number of hours worked in excess of 40 for each workweek times 50% of the plaintiff's regular rate for the week. The plaintiffs appealed to the Fourth Circuit, arguing that they should be paid 150% of their regular rate for each overtime hour.

Noting that the weekly salary paid to the plaintiffs was meant to cover all hours worked during the week and looking to previous court decisions and a Department of Labor opinion letter, the Fourth Circuit agreed with Charles Town Gaming that overtime should be calculated at 50% of the regular rate. The Fourth Circuit also took the opportunity to reiterate the standard for willfulness under the FLSA, which affects the statute of limitations and thus the period for which back pay can be recovered. The default statute of limitations under the FLSA is two years. However, the limitations period is expanded to 3 years for willful violations. The Fourth Circuit reiterated that for an employer to have willfully violated the FLSA, the employer must have known or showed reckless disregard for whether its conduct violated the FLSA.

Employer misclassification collective and class action suits under the FLSA and state law are increasingly common and expensive for employers. The Fourth Circuit's decision in *Desmond* and those like it help to limit the back pay that an employer may have to pay if it mistakenly classifies certain categories of employees as exempt under the FLSA, especially since the liquidated damages recoverable under the FLSA for successful plaintiffs is calculated based on the amount of back pay awarded. To increase the likelihood that it will only be assessed overtime back pay at 50% of regular rate rather than 150% of regular rate in a misclassification suit, an employer should ensure that the fixed salary paid to exempt employees is high enough to meet the minimum wage requirements of the FLSA and state law for all hours worked by those employees and that there is a clear mutual understanding with the employee that the fixed salary is meant to cover all hours worked during the pay period. This is often accomplished by having an employee sign an offer letter with a statement to this effect. Employers should also be sure to check applicable state law wage-and-hour requirements, which can vary from the FLSA, in classifying employees.

## Use of Credit Reports in Employment Decisions is Under Heightened Scrutiny

As employers increasingly use credit reports to help screen out applicants who may be unreliable or untrustworthy, the number of regulations governing the use of such reports is expanding. Most employers are aware that they must comply with the rigid procedural requirements of the federal Fair Credit Reporting Act ("FCRA") before seeking to procure and use a credit

report for employment purposes. But the FCRA is not the end of the inquiry.

State and federal legislators have intensified their focus on employers' use of credit history as an employment screening tool. Four states—Hawaii, Oregon, Washington, and, most recently, Illinois—have already passed laws imposing significant restrictions on employers' use of credit history information for employment purposes. These laws generally prohibit covered employers from inquiring about an applicant or employee's credit history or obtaining a credit report. There are, however, exceptions in these laws to allow the use of credit information in certain circumstances and for certain positions. Similar legislation is pending in more than a dozen states, including New Jersey, Pennsylvania and Connecticut.

On the federal level, Representative Stephen Cohen (D. Tenn.) reintroduced a bill on January 19, 2011 concerning the use of credit history for employment purposes. The proposed Equal Employment for All Act (H.R. 321) would amend the Fair Credit Reporting Act to prohibit the use of consumer credit checks in making adverse employment decisions against employees or prospective employees, with only a few exceptions. According to Representative Cohen, "using a job applicant's credit history to deny employment is not fair because personal credit history is not an accurate predictor of job performance." H.R. 321 is supported by numerous civil rights and consumer advocacy groups and has over twenty Democratic supporters.

The Equal Employment Opportunity Commission has likewise stepped up its enforcement efforts in this area. For years, the EEOC, like many state fair employment practices agencies, has taken the position that the use of credit reports in employment decisions has a disparate impact on certain minority groups. Recently, however, the EEOC has become much more aggressive in trying to curb employers' use of credit checks. In an attempt to send a firm message to employers, the EEOC brought a class action suit in December 2010 against Kaplan Higher Education Corp. in the Northern District of Ohio, alleging that the company engaged in a pattern or practice of discrimination by refusing to hire applicants based on their credit histories. The EEOC contends that this practice has an unlawful disparate impact on African Americans and is neither job-related nor justified by business necessity. Kaplan responded by asserting that it conducts background checks on all prospective employees and that these checks are job-related and necessary for its organization to ensure "that staff handling financial matters, including financial aid, are properly screened."

The EEOC's highly publicized lawsuit against Kaplan follows its October 20, 2010 public meeting, where it heard testimony from various stakeholders on the growing use of credit history information in making employment decisions. Representatives of civil rights groups cited studies showing that racial minorities and women tend to have lower credit scores and argued that there is no evidence of any correlation between bad credit and job performance. It is unclear whether the EEOC will issue formal guidance following the October 2010 meeting, but the EEOC has nevertheless emphasized that employers should ensure that their credit history practices are entirely job related and consistent with business necessity.

In one victory for employers, the United States Court of Appeals for the Third Circuit recently held that § 525(b) of the Bankruptcy Code, 11 U.S.C. § 525(b), which prohibits discrimination against an individual solely because he or she is or has been a debtor or bankrupt, does not apply to failure to hire claims. *See Rea v. Federated Investors*, 627 F.3d 937 (3d Cir. Dec. 15, 2010). While private employers may not *discharge* an employee because he or she files for bankruptcy, the anti-discrimination provision for private employers (contained in § 525(b)) is silent as to whether an applicant's bankruptcy status may be considered when making a *hiring* decision. Noting that Congress crafted § 525(b) more narrowly than § 525(a) (which prohibits governmental entities from discriminating against certain debtors and specifically lists "deny employment to" among its prohibitions), the Third Circuit joined the majority of courts and concluded that the bankruptcy code does not prevent private employers from declining to hire job applicants because they filed for bankruptcy protection. To date, only one court has found to the contrary. *See Leary v. Warnaco, Inc.*, 251 B.R. 656 (S.D.N.Y. 2000).

Given the recent state legislative activity concerning the use of credit history as a hiring criterion, employers should review their credit history policies and practices and ensure that they are in compliance with any applicable state laws. Additionally, in light of the EEOC's recent activity, employers in all cases should proceed with caution when making employment decisions based on credit histories. Employers who use credit histories in their selection decisions should ensure that they are directly related to the job in question and necessary for a legitimate business purpose.

## NLRA Update: Board Finds ''Preemptive Strike'' Violated Act; General Counsel Files Complaint Against Employer for Terminating Employee Based on Facebook Post; Board Proposes Posting Requirement Concerning Employee Rights

A number of recent developments involving the National Labor Relations Board suggest that the Board is expanding the reach of the National Labor Relations Act as it applies to non-union employers. Three such developments are discussed below.

On January 28, 2011, the Board held a company liable for violating § 8(a)(1) of the NLRA when it fired an employee who might have, but had not yet, engaged in protect concerted activity. Specifically, the Board held that Parexel International LLC violated the Act by terminating the employment of Theresa Neuschafer after she complained to her supervisor that certain employees received special treatment at the pharmaceutical research company. According to the Board, even though Neuschafer had not engaged in concerted activity, her termination was "a pre-emptive strike to prevent her from engaging in activity protected by the Act." Noting that the "suppression of future protected activity is exactly what lies at the heart of most unlawful retaliation against past protected activity," the Board concluded that it was not fatal to Neuschafer's claim that she had not yet engaged in concerted activity. Accordingly, "[i]f an employer acts to prevent concerted protected activity—'to nip it in the bud'—that action interferes with and restrains the exercise of § 7 rights and is unlawful without more."

The question of the extent to which employee use of "social media" like Facebook and Twitter can be protected by § 7 of National Labor Relations Act (which protects "concerted activities" for "mutual aid and protection") is a vexing one for employers. In a recent filing against American Medical Response of Connecticut ("AMR"), the General Counsel of the National Labor Relations Board proffered an expansive view of § 7. AMR terminated an employee after the employee violated the company's "Blogging and Internet Posting Policy" by posting negative comments about her supervisor on her Facebook profile from her home computer. The policy prohibited employees from posting comments or pictures that depict the company in any way, on any form of media, absent express written approval, and from making any disparaging comments when discussing the company or the employee's supervisors.

On October 27, 2010, the General Counsel issued an unfair labor practice complaint against AMR. It alleged AMR interfered with employees' § 7 right in two ways: (1) by firing the employee in retaliation for engaging in "concerted activity," i.e. posting negative comments on Facebook; and (2) by maintaining an overly broad policy. In so doing, the General Counsel asserted the novel position that speech on Facebook and similar social media sites constitutes "concerted activities" pursuant to the NLRA.

A decision on the merits of the General Counsel's position will have to await another day, however. On January 24, 2011, one day before a scheduled hearing with an administrative law judge, the case settled, with AMR agreeing to change its policy. AMR indicated that its new employee internet policy will not restrict employees from discussing wages, hours, and working conditions with co-workers and others when not at work. AMR made a separate private agreement regarding the discharged employee.

A third development that may have a significant impact on employers is the Board's proposal of a new rule requiring all employers subject to the NLRA to post physical, and in some cases electronic, notices advising employees of their § 7 rights, including the right to organize, form or join a union, bargain collectively through a union representative, and engage in concerted activities with other employees. *See* Notice of Proposed Rule, 75 Fed. Reg. 80410-80420 (Dec. 22, 2010). The Board contends that the rule is necessary because it believes most employees are ignorant of their NLRA rights and that the posted notice will encourage employees to enforce, and dissuade employers from violating, employees' NLRA rights.

Under the proposed rule, the notice must provide detailed descriptions and examples of employees' rights under the NLRA. The NLRB recommends that the notice's content track the notice requirement concerning organization rights imposed by the Department of Labor on federal contractors. If a covered employer fails to provide notice, the proposed rule provides for sanctions including: (1) characterizing the failure to post the required notices as an unfair labor practice; (2) tolling the sixth-month statute of limitations for filing unfair labor practice charges against the non-posting employer; and (3) considering knowing failure to post as evidence of 'unlawful motive' in an unfair labor practice case. Republican Board member Brian Hayes objected to the proposed rule.

## Appellate Courts Split on WARN Act Issues

The federal Worker Adjustment and Retraining Notification Act ("WARN Act") requires employers who order "plant closings" and "mass layoffs" to provide 60 days' advance notice to all employees who suffer an "employment loss" in connection with such action. The statute provides, however, that the employment losses covered under the statute do not include "voluntary departures." In recent decisions, the Courts of Appeals for the Seventh and Ninth Circuits considered the issue of what constitutes a voluntary departure under the WARN Act, and reached differing conclusions.

In *Ellis v. DHL Express Inc.* (7th Cir. Jan. 11, 2011), the Seventh Circuit addressed whether an employee who elects to separate from employment as a part of an exit incentive program offered amid substantial uncertainty as to an employer's continued existence should be counted as experiencing an employment loss under the WARN Act. In November 2008, DHL announced that it would cease U.S. domestic shipping services. As a result, the company announced plans to close five of its six Chicago area facilities. After negotiations with the unions representing the affected employees, DHL offered employees at the facilities the option to take a severance package or to bid for open jobs at the company's remaining facility. Employees were given very little time—between two and nine business days—to decide whether to accept the packages. Employees who accepted the package were required to sign a release of all claims.

Two employees who did not accept a package and were later laid off filed suit against DHL under the WARN Act, asserting that all employees who were laid off by DHL, including those who had accepted severance and executed a release, experienced employment losses under the Act and that therefore the numerical threshold for the issuance of notice (in this case more than 50 employees constituting 33% of the total number of employees at a single site of employment) was triggered. According to the plaintiffs, because of the pressure placed on employees in connection with DHL's severance offers, acceptance of the packages was not "voluntary," and therefore employees who received severance should be counted in determining whether the WARN Act's notice threshold had been met.

The Seventh Circuit affirmed the lower court's rejection of the plaintiffs' claims. Although the plaintiffs had "paint[ed] a wretching picture of a difficult decision that had to be made quickly," the court wrote, "they do not demonstrate that the workers were given incomplete information, or that DHL somehow strong-armed them into signing the release forms against their will." Accordingly, the court concluded that it "cannot conclude...that the workers who accepted union-negotiated severance packages did so involuntarily."

The issue of voluntariness was also recently considered by the Ninth Circuit in *Collins v. Gee West Seattle LLC* (9th Cir., Jan. 21, 2011). That case arose after Gee West, an operator of automobile dealerships, announced on September 26, 2007 that it would be going out of business on October 7, 2007. Between September 26 and October 5, 2007, all but 30 of Gee West's 150 employees stopped coming to work. In response to a lawsuit alleging that it failed to provide the 60 days' notice required under the WARN Act, Gee West asserted that the approximately 120 employees who left the company prior to October 5 did not experience employment losses because they voluntarily departed their employment. The district court agreed, holding that the "pre-closure departure of the 120 employees...is not any less 'voluntary' for having possibly been motivated that they would be unemployed in the near future."

The Ninth Circuit reversed, concluding that the employees who left their jobs before October 5, but after Gee West's announcement of the closure, experienced an employment loss as a result of the company's plant closing. According to the court, "unless there is some evidence of imminent departure for reasons other than the shutdown, it is unreasonable to conclude that employees voluntarily departed after receiving notice of the upcoming closure." The court then went on to announce a general rule that "[e]mployees' departure because of a business closing...is generally not voluntary, but a consequence of the shutdown and must be considered a loss of employment when determining whether a plant closure has occurred."

While application of the WARN Act may appear at first blush to involve nothing more than simple mathematical calculations, cases like *DHL* and *Gee West* show that this is far from the truth. Particularly because liability under the WARN Act is often dependent on events occurring after the deadline for an employer's issuance of notice to employees, employers must carefully consider whether voluntary decisions by employees have the potential to derail an employer's attempts to avoid statutory liability.

## Practice group contacts

If you have questions regarding the information in this update, please contact the Dechert attorney with whom you regularly work, or any of the attorneys listed. Visit us at www.dechert.com/employment.

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