

Employment Law & HR Update

Solving Employee Problems Before They Happen

by

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April 2008

Retaliation Against Third Parties Counts

In Thompson v. North American Stainless, No. 07-5040 (6th Circuit, March, 2008), Eric Thompson worked as a metallurgical engineer for North American Stainless. Miriam Regalado was hired by North American in 2000. Shortly thereafter, Thompson and Regalado started dating.

In September 2002, Regalado filed a charge with the Equal Employment Opportunity Commission (EEOC) against North American alleging that her supervisors discriminated against her on the basis of her gender. On February 13, 2003, the EEOC notified North American Stainless of Regalado's charge. A little more than three weeks later, on March 7, 2003, North American terminated Thompson's employment. Thompson alleged that he was terminated in retaliation for Regalado filing her EEOC charge. North American Stainless contended that Thompson was terminated due to his performance.

At the time of his termination, Thompson and Regalado were engaged to be married and their relationship was common knowledge throughout the company.

Thompson filed a charge of retaliation with the EEOC. The EEOC found there was "reasonable cause" to believe that North American violated Title VII and terminated Thompson in retaliation for Regalado filing her charge of gender discrimination.

North American Stainless moved to have the lawsuit dismissed on summary judgment, arguing that Thompson's claim that his "relationship to Regalado was the sole motivating factor in his termination" was simply not illegal under Title VII even if Thompson's allegation was true. The district court granted North American's motion, holding that Thompson failed to state a claim under Title VII.

Thompson appealed this dismissal to the Sixth Circuit Court of Appeals arguing that the anti-retaliation provision of Title VII does in fact prohibit an employer from terminating an employee based on the protected activity of his fiancée who worked for the same

employer. In reviewing the case, the Sixth Circuit examined Section 704(a) of Title VII of the Civil Rights Act, which prohibits retaliation by employers against employees who exercise their rights under Title VII.

It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter. (42 U.S.C. § 2000e-3)

Further, in Burlington Northern and Santa Fe Railway Co. v. White, – U.S. –, 126 S.Ct. 2405 at 2412 (2006), the U.S. Supreme Court held that:

“The anti-retaliation provision seeks to secure [a non-discriminatory workplace] by preventing an employer from interfering (through retaliation) with an employee’s efforts to secure or advance enforcement of the Act’s basic guarantees.”

The Supreme Court then went on to hold in Burlington that a plaintiff must demonstrate that he suffered a “materially adverse” retaliatory action, which it defined as one that “well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.” In this case, a literal reading of section 704(a) suggests a prohibition against employer retaliation only when it is directed to the individual who conducted the protected activity. However, such a reading “defeats the plain purpose” of Title VII. There is no doubt that an employer’s retaliation against a family member after an employee files an EEOC charge would in fact dissuade “reasonable workers” from engaging in such actions.

The court then looked to the EEOC Compliance Manual to support its reasoning. The EEOC’s Compliance Manual expressly states that a person claiming retaliation need not be the one who conducted the protected activity. Specifically, in Johnson v. University of Cincinnati, 215 F.3d 561, 580 (6th Cir. 2000), the court reasoned:

“Title VII . . . prohibit[s] retaliation against someone so closely related to or associated with the person exercising his or her statutory rights that it would discourage that person from pursuing those rights.” (quoting EEOC Compliance Manual (CCH) ¶ 8006).

Therefore, the Sixth Circuit reasoned that Title VII does in fact prohibit employers from taking retaliatory action against employees not directly involved in a protected activity, but who instead are so closely related to or associated with those who are directly involved that it is clear the protected activity motivated the employer’s adverse actions. To hold otherwise, reasoned the court, would undermine the purposes of Title VII.

WHAT DOES THIS MEAN TO HUMAN RESOURCES?

Document ... Document ... Document!

Since this decision opens the door of retaliation lawsuits to third parties, or bystanders, employers must be able to show why they are taking an adverse action against an employee. Even though the Thompson case dealt with a fiancé relationship, which later become a spousal relationship, the reasoning of the court relied heavily on the EEOC Compliance Manual (CCH) 8006, which states:

“Title VII . . . prohibit[s] retaliation against someone so closely related to or associated with the person exercising his or her statutory rights that it would discourage that person from pursuing those rights.” (quoting EEOC Compliance Manual (CCH) ¶ 8006).

As a result, close acquaintances and friends of employees who exercise their rights under Title VII and other employment laws may also very likely have the same protections as Mr. Thompson whenever they feel their employer has targeted them due to their support of another protected employee. Such a scenario may give protections to employees the employer never even considered as being protected.

Again, if it is not written down ... it did not happen. Document ... Document ... Document!

New OSHA Rule Requires Employers to Pay for Employees' Personal Protective Equipment

For years many employers have been confused about what types of personal protective equipment (“PPE”) they were required to pay for in order for their employees to perform their jobs safely. This confusion existed because the Occupational Safety and Health Administration (OSHA) had never adopted a clear standard that defined who was actually responsible for paying for an employee’s PPE. While in most cases OSHA has always held the employer responsible for providing and paying for PPE, there were exceptions when an employee could be asked to pay for their own PPE. At times it remained unclear when or how these exceptions would be applied.

However, on November 15, 2007, the federal Occupational Safety and Health Administration (OSHA) published its new rules regarding what types of personal protective equipment (PPE) employers must pay for to protect their employees. Still, it is important to understand that the Final Rule does not create a new obligation to provide additional PPE or different PPE. Instead, the Final PPE Rule does clarify that whenever PPE is required, it is the employer who must provide and pay the costs associated with PPE, which includes such items as hard hats, safety glasses, welding helmets, face shields and so on. The Final Rule does provide for a few limited exceptions as to when an employer may require their employees to bear the cost of their PPE.

Exceptions to the Payment Requirement

Employers are not required to pay for non-specialty safety-toe footwear or non-specialty prescription eyewear, as long as the employer allows the employee to wear these items off the job site and the items are such that they can be used outside the job site.

Additionally, employers are not required to pay for shoes with integrated metatarsal protection as long as the employer provides and pays for metatarsal guards that attach to the employees' shoes. Further, employers in the logging industry are not required to pay for logging boots.

Finally, employers are not required to pay for ordinary clothing, such as long sleeves, long pants, street shoes, and so on that may serve as PPE, nor are employers required to pay for ordinary clothing, such as winter coats, gloves, and so on, or items such as skin cream or lotion used solely as protection from the weather. If, however, ordinary weather gear is not sufficient to protect the employee, and special equipment or extraordinary clothing is needed to protect the employee from unusually severe weather conditions, the employer will be required to pay for such protection. Of course, clothing used in artificially controlled environments with extreme hot or cold temperatures, such as freezers, is not considered part of the weather gear exception.

Replacement PPE

The Final Rule requires the employer to pay for replacement PPE unless the employee has lost or intentionally damaged the PPE issued to him or her.

Personal PPE

If an employee voluntarily requests to use his or her own PPE, and the employer permits this, it is not required to reimburse the employee for the cost of the PPE.

Effective Date

The Final Rule becomes effective February 13, 2008 (ninety days from the date of publication in the Federal Register). However, OSHA has extended the compliance deadline for six months to minimize the impact on collective bargaining agreements and give employers time to implement the requirements. The compliance date is now May 15, 2008.

For More Information on these and other various issues, as well as how to best protect your organization, please feel free to contact Scott directly at 614-367-0842 or through his website at www.scottwarrick.com.

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