Employment Law Update 2011 – The Year in Review

Sheryl J. Willert and Josephine B. Vestal

WILLIAMS KASTNER

Sheryl J. Willert

Josephine B. Vestal

With a Democratic administration in charge of the White House and one house of Congress, it is not unexpected that there has been significant activity, both federally and on the state level, with respect to employment related issues. Some of the decisions that have come out of the Courts come as no surprise; they are simply a rational extension of those concepts that have governed the workplace for years. However, others bear close consideration by employers.

United States Supreme Court

Staub v. Proctor Hospital, 131 S. Ct. 1186, 2011 U.S. LEXIS 1900, (March 1, 2011). *"Cat's Paw Theory" Extended:*

Vincent Staub, an angiographer for Proctor Hospital was terminated from his position after he was accused of violating hospital policies and after complaints from co-workers about his frequent unavailability and abruptness. Staub's supervisors had been vocal in their disdain for his military service and had described it as a waste of taxpayer dollars. Moreover, they had complained his service had created a strain on the department, and at least one of them had requested that others assist in getting rid of him. After reports of violations of hospital policies, Staub was terminated. The decisionmaker was not alleged to be biased, but had gotten some input on the decision from one of the supervisors alleged to be biased against Staub because of his military service.

A jury found that Staub's military status was **a motivating factor** in his termination and awarded him $57,640.00. The Seventh Circuit reversed, relying on the theory that a case cannot succeed unless a biased nondecisionmaker exercised such "singular influence" over the decisionmaker that the decision to terminate was the product of "blind reliance" on that recommendation. 2011 U. S. LEXIS 1900 *8. Although the Seventh Circuit admitted that the manager making the determination that Staub should be terminated could have engaged in a more detailed investigation, it declined to find that the manager was required to do so when his/her decision was not wholly dependent on the single discriminatory source of information.

In reviewing the case, and after engaging in an analysis of proximate cause under traditional tort theory, the United States Supreme Court ruled that regardless of whether or not the manager was wholly "dependent" on the opinions of those who hold discriminatory animus, if a biased supervisor recommends adverse action, has the ability to influence the result, and if that recommendation is a "proximate cause of an ultimate employment action," the employer is liable for violation of USERRA. 2011 U.S. LEXIS 1900 *20.

Although this case is decided in the context of USERRA, it likely has equal applicability to all tort based employment claims.

Rent-A-Center, West, Inc. v. Antonio Jackson, 130 S. Ct. 2772, 177 L. Ed. 2d 403, 2010 U.S., LEXIS 4981 (June, 2010). *Enforceability of Arbitration Agreements:*

The United States Supreme Court also weighed in on the issue of whether with an arbitration agreement under the Federal Arbitration Act, 9. U.S.C. §§ 1-16, a district court can decline to enforce an arbitration provision where the employee claims that the arbitration provision is unenforceable because it is unconscionable and the agreement explicitly assigns that decision to the arbitrator.

Jackson filed a discrimination action against his former employer Rent-a-Center in federal court. Rent-a-Center filed a motion in that action to dismiss or stay the proceeding and to compel arbitration under the FAA. Jackson had signed a Mutual Agreement to Arbitrate Claims as a condition of his employment. That Agreement contained an arbitration clause, which delegated to the arbitrator the exclusive authority to resolve any disputes about the enforceability of the agreement. In the district court, Jackson failed to challenge this delegation of authority but instead challenged the validity of the entire contract to arbitrate on the grounds that the agreement was unconscionable because of its requirements for fee splitting and limitations on discovery. The district court determined that this failure to raise concerns other than the argument that the agreement was unconscionable constituted a fatal flaw in his appeal. The Ninth Circuit reversed the District Court, finding that the initial determination of whether a contract to arbitrate is unconscionable should be determined by a court. The U.S. Supreme Court disagreed.

In rendering its decision, the Court stated that arbitration agreements are a matter of contract, and their validity and enforceability of the agreement to arbitrate can be challenged in court, as opposed to arbitration, in two circumstances: fraud in the inducement of the agreement or illegality of a provision of the agreement, which renders the entire agreement invalid.

Thompson v. North American Stainless, LP, 131 S. Ct. 863, 2011 U.S. LEXIS 913 (January 24, 2011). *Standing to Claim Retaliation:*

Petitioner, Eric Thompson was terminated after his fiancée filed a sex discrimination charge with the EEOC against North American Stainless ("NAS"), which employed both Mr. Thompson and his fiancée. Mr Thompson then brought a claim against North American Stainless under Title VII of the Civil Rights Act of 1964, alleging that NAS fired him in retaliation for the complaint filed by his fiancée. The Sixth Circuit found that Thompson did not have standing to sue NAS and dismissed his complaint.

Thompson argued before the Supreme Court that Title VII not only prohibits retaliation against third-parties who had not themselves engaged in any protected activity, but also gives third-party victims standing to sue, as this furthers Title VII's goal of eliminating discrimination and is consistent with the EEOC's longstanding interpretation of Title VII. NAS argued Title VII does not give those third-parties standing to sue the allegedly retaliating employer because permitting such an action would contradict congressional intent and unnecessarily curtail employers' ability to manage their workforces.

The court, agreeing with Thompson, concluded that Title VII's ban on workplace retaliation against an employee who challenges discrimination also protects a co-worker who is a relative or close associate of the targeted employee who is subject to adverse action because of his or her relationship with the targeted employee. The Court reasoned that Title VII prohibits any employer action that might well have dissuaded a reasonable worker from making or supporting a discrimination charge. Here it found that a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiancée would be fired. Accepting the facts as alleged by Thompson, he was not an accidental victim of retaliation. Hurting him was the unlawful act by which NAS punished his fiancée, and thus he had standing to sue under Title VII.

Appellate Court Decisions

Parth v. Pomona Valley Hospital Medical Center, 584 F.3d 794 (9th Cir. 12/13/10). *Wage and Hour:*

Nurses at Pomona Valley Hospital claimed violations of the Fair Labor Standards Act after the hospital reduced hourly rates for employees who elected to take a reduced hourly base wage with overtime for working more than eight hours in any given day in exchange for the ability to work twelve hour shifts in order to have more time away from work. The effect was that the employees received the same wages as they received under the former schedule. Plaintiff claimed that the pay scheme was intended to avoid the overtime and maximum hour requirements of the FLSA, that the company had no right to reduce the hourly rate and that there was no justification for the differential in base hourly rate. In ruling against the nurses, the court looked to the purpose of the FLSA, which is to ensure that employees are paid a "fair day's pay for a fair day's work." Williamson v. Gen. Dynamics Corp, 208 F.3d 1144 (9th Cir. 2000). The Court ruled that as long as the hourly rate was above minimum wage, the fact that it may not have been ideal for the nurses to have a reduced hourly rate, the reduction in the hourly rate was not a violation of the FLSA.

U. S. Equal Employment Opportunity Commission v. UPS Supply Chain Solutions, 620 F.3d 1103 (9th Cir. 8/27/10). *ADA:*

Plaintiff, who was deaf from birth and whose first and primary language was American sign language (ASL), complained to the EEOC that his employer failed to provide him with interpreters or any reasonable accommodation with respect to training, content of meetings and disciplinary matters. The EEOC filed a lawsuit on his behalf. Despite repeated indications to the employer by the plaintiff that he did not understand things that were provided to him in writing, the company's efforts were at best sporadic. Plaintiff repeatedly asked for an ASL interpreter for scheduled meetings. He was granted an ASL interpreter sporadically later in his employment. In ruling against the employer, the Ninth Circuit found that the employer's obligations with respect to accommodation were not limited to a single action of accommodation. Instead, the court ruled that once an employer is aware that there is a need for a different accommodation because the proffered accommodation is failing, an employer must engage in a continuing interactive process in order to search for a reasonable accommodation for the employee that is effective.

Collins v. Gee West Seattle, LLC., 631 F.3d 1001 (9th Cir. 1/21/2011). *Reductions in Force, WARN Act Claims:*

The WARN act requires employers to provide notice 60 days in advance of covered plant closings and covered mass layoffs. In general, employers are covered by WARN if they have 100 or more employees, not counting employees who have worked fewer than six months in the last 12 months and not counting employees who work an average of fewer than 20 hours a week. Private for-profit employers and private nonprofit employers are covered, as are public and quasi-public entities which operate in a commercial context and are separately organized from the regular government. Regular federal, state, and local government entities that provide public services are not covered.

In the instant case, Gee West Seattle, which owned multiple Seattle car franchises, notified its employees that it was actively pursuing the sale of the business and would close its doors on a date certain, whether or not a formal buyer was found. This notification triggered significant defections from the company. Gee West failed to provide WARN notice to its employees. Subsequent to closure, the employees sued, alleging breach of the WARN Act notice provisions. Gee West attempted to defend on the basis that the attrition was voluntary. The court ruled that once notice of imminent closure had been announced, the WARN Act provisions applied if there were sufficient employees to trigger coverage as the day of the announcement of imminent closure.

***Sheryl Willert** is Managing Director of Williams Kastner and a member in the Seattle office's counseling, investigations, litigation and alternative dispute resolution practices. Ms. Willert has litigated cases involving all aspects of employment law for both unionized and nonunionized employer in both the public and private sectors. **Josephine Vestal** has practiced law primarily in the areas of employment law and employment and discrimination litigation since 1981. She is a member in the Seattle office and is former chair of the firm's Labor & Employment Practice Group. In addition to litigation and agency practice in all areas of employment law, Ms. Vestal counsels employers ranging from multinational corporations to small employers on regulatory compliance, their employment contracts, employee benefits, personnel policies and strategic planning decisions, and also conducts employment related investigations.*

Please email the authors at swillert@williamskastner.com or jvestal@williamskastner.com any questions about this article.