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Employment Trends

Timeline: Impact of *Health Care Reform* on Employers

By David Ball and Miranda Morgan

The Patient Protection and Affordable Care Act (PPACA), better known as Health Care Reform, signed into law in March 2010, contains a series of measures that will impact employers over the next several years. This article summarizes several of the more significant provisions, including the Employer Mandate, which goes into effect in 2014. Much remains to be determined, however, as government agencies, principally the Department of Health and Human Services, issue regulations and interpretive bulletins to clarify the numerous unknowns.

This timeline is based on requirements for single-employer plans that operate on a calendar year basis.

QUICK LOOK INSIDE

SPRING 2010

2010

- **Small Business Health Tax Credit:** Companies with 10 employees or less may get a tax credit of up to 35 percent of the employer's premium costs (25 percent for tax exempt small employers), but only if they pay their workers $25,000 or less and provided the employer contribution is at least 50 percent of the premium costs. Credit is reduced on a sliding scale per employee for companies with 11-25 employees, and is reduced as the average wage increases from $25,000 to $50,000. Companies with more than 25 employees, or that pay their employees on average over $50,000, are not eligible. This tax credit is only available for a maximum of five years, and only two years once the Health Insurance Exchanges are up and running in 2014.

- **Nursing Mothers:** Effective immediately, employers are required to provide nursing mothers with "reasonable break time" to express breast milk for up to one year after the birth of their child. The Department of Labor will issue regulations to define what constitutes reasonable break time and how violators will be penalized. Employers are also required to provide a place, other than a bathroom, shielded from view and free from intrusion, where nursing mothers can take these breaks. This requirement generally applies to all employers, regardless of size, but employers with less than 50 employees may be exempted if this would cause an undue hardship. The PPACA does not require that this time must be compensated.

- **Early Retirees:** The legislation creates a temporary reinsurance program to assist companies that provide early retiree health insurance for ages 55-64. Employers will be reimbursed up to 80 percent of the cost of providing coverage to early retirees, their spouses and dependents. Claims in excess of $15,000 and below $90,000, indexed for inflation, will be reimbursed.
  - *This fund will sunset on Jan. 1, 2014, or earlier if the $5 billion that has been appropriated is depleted. Employers*

offering benefits to early retirees may want to evaluate their offerings in view of this temporary program.

- **Automatic Enrollment:** As soon as implementing regulations become effective, unless the employee affirmatively opts out or selects a different coverage option, all employers with 200 or more full-time employees must automatically enroll new full-time employees in the lowest premium group health plan coverage option.
  - *Employers will need to amend their plan materials and prepare materials that notify employees that they will be automatically enrolled unless they opt out.*

2011

- **Coverage for Older Children:** Effective Jan. 1, 2011, persons under age 26 who would be treated as dependents under the plan but for their age are eligible for coverage. This is not limited to full-time students or unmarried children.
  - *Employers will need to remove any student eligibility requirements from their plan documentation and enrollment materials that would otherwise apply prior to age 26. Employers will also need to decide whether the additional cost should be paid only by employees who request coverage for older children (if this is permitted by the forthcoming regulations) or spread across all employees that elect family coverage.*

- **Coverage Reforms:** Lifetime dollar limits on "essential health benefits," as will be defined by forthcoming regulations, rescission of existing coverage and exclusion based on pre-existing conditions for children under age 19 are prohibited. In addition, the Department of Health and Human Services will restrict employers' ability to impose annual limits for "essential health benefits." Dental and vision care will likely not be included within the regulatory definition of "essential health benefits."
  - *Employers will need to amend their plan materials to reflect these changes, and consider whether changes in plan design are necessary to limit the increases in premiums that would otherwise result.*

- **W-2 Reporting:** Employers will be required to report the aggregate cost of employer-sponsored health care benefits on the employee's W-2.
  - *Employers will need to develop a process for determining this amount and ensuring that it is reported.*

- **Health Savings Account Penalty:** The penalty for making non-qualified purchases from a Health Savings Account increases to 20 percent.

- **Nondiscrimination Based on Salary or Wages:** Eligibility for health care benefits may not be limited based on compensation and may not otherwise discriminate in favor of more highly paid employees.
  - *Employers may need to amend their plans, particularly with respect to any special health care benefits provided to executives.*

- **Over the Counter Medications:** Non-prescription medications (other than insulin) can no longer be reimbursed under Flexible Savings Accounts, Health Savings Accounts or Health Reimbursement Accounts.
  - *Employers will need to amend their plan materials and change their procedures to monitor this change.*

- **Federally Subsidized Long-Term Care:** Employees may begin to authorize payroll deductions for the Community Living Assistance Services and Supports (CLASS) long-term care program. Working adults may be automatically enrolled unless they opt out.
  - *Employers will need to coordinate these deductions with their payroll services providers.*

2012

- **Uniform Explanation of Coverage:** Group health plans and self-insured companies must provide participants a uniform summary of benefits and coverage. This summary may not be longer than four pages and must describe the benefits in a "culturally and linguistically appropriate manner."

Editor's Notes

We publish *Employment Trends* to keep you informed of current legal developments in labor and employment law. *Employment Trends* will provide you with practical advice to assist in the management of your workplace and help you avoid legal conflict. *Employment Trends* is a publication of SZD's Labor and Employment and Workplace Safety Practice Groups.

Please contact me with suggestions for future topics and articles. We appreciate your input.
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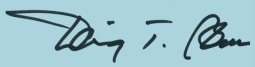

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2013

- **Notice of Coverage Options:** No later than March 1, 2010, employers must provide written notice to newly hired and current employees informing them of the availability of the Health Insurance Exchanges, how to contact the Exchange, eligibility requirements for public assistance and the tax consequences to the employee of purchasing coverage through an Exchange.

- **Elimination of Part D Deduction Subsidy:** The employer tax deduction for the Part D subsidy will be eliminated.

- **Medicare Payroll Taxes:** For those with wages and self-employment income in excess of $200,000 ($250,000 joint), Medicare payroll taxes will increase by 0.9 percent.

- **Flexible Spending Account Limits:** Flexible Spending Account contributions will be limited to $2,500 annually. This figure will be adjusted annually for inflation after 2013.

2014

- **Health Insurance Exchanges:** States must establish Health Insurance Exchanges to facilitate the purchase of qualified health plans, with a SHOP exchange that will enable small businesses to offer a choice of plans to their employees.

- **Employer Mandate:** Some companies will be required to provide insurance, pay penalties or both. Penalties are based on the number of full-time employees; whether the company offers coverage; and whether one or more employees qualify for a government health care coverage premium subsidy. Individuals whose household income is below 400 percent of the federal poverty line ($88,000 for a family of four) are eligible to apply for the premium subsidy. Companies that either employ 50 or fewer employees or offer insurance and no employee receives a subsidy will not be penalized. Companies that employ more than 50 employees, that offer health care insurance and one or more receives a premium subsidy will be penalized the lesser of: (a) $3,000 per employee who receives a credit or public assistance because (1) the employer pays less than 60 percent of the full value of the coverage provided or (2) the employee's premium is greater than 9.5 percent of the employee's household income; or (b) $2,000 per employee. Companies that employ more than 50 employees, do not offer health care insurance and have one or more employees receiving a premium subsidy will be penalized $2,000 per employee, after subtracting the first 30 employees.

- **Free Choice Vouchers:** Employees whose household income does not exceed 400 percent of the federal poverty line and for whom the employee premiums for an employer-provided health plan cost between 8 percent and 9.5 percent of the employee's household income are eligible for a Free Choice Voucher. The value of the Free Choice Voucher is equal to the cost of coverage that the employer would otherwise have paid if the employee was covered under the employer's plan and is used by the employee to purchase coverage through a Health Insurance Exchange. The amount of the Free Choice Voucher is deductible by the employer.

- **Small Business Health Tax Credit:** Maximum tax credit for small employer premium costs increases from 35 percent to 50 percent (35 percent for tax exempt small employers).

- **Annual Reports:** Employers with more than 100 full-time employees must file an annual report with the Department of Health and Human Services on whether they offer a health plan that covers essential health benefits and other details of coverage offered and employee participation. Employers must provide a copy of their report to participants.

- **Coverage Reforms:** Annual limits and pre-existing condition exclusions for persons of any age prohibited for group health plans. Plans may no longer set eligibility rules based on health status, medical condition, claims experience, receipt of health care, medical history, genetic information, evidence of insurability or disability. Waiting periods limited to a maximum of 90 days.
  - *Employers will need to amend their plan documents to reflect these changes. Employers that currently have longer waiting periods or that permit admission only on certain days will need to amend their plan materials.*

2017

- **Large Employer Participation in Exchanges:** States may choose to permit large employers to offer coverage through the Health Insurance Exchanges.

2018

- **"Cadillac Tax":** Health coverage costing in excess of $10,200 annually for an individual or $27,500 annually for a family (with increased thresholds for certain high-risk professions and retirees over age 55) will be taxed at 40 percent. These thresholds are indexed to the Consumer Price Index (CPI) plus 1 percent for the first two years, and to the CPI only for 2020 and beyond.

If you have questions about the impact of health care reform on employers or for assistance with compliance issues, please contact Miranda Morgan, member of SZD's Employee Benefits and Tax and Wealth Management Practice Areas, at 614.462.1064 or mmorgan@szd.com, David Ball or any member of SZD's Labor and Employment Practice Group. ■

Court Rejects Circumstantial Evidence of Age Discrimination in Reduction in Force

By Amanda Wickline

A recent Sixth Circuit decision contains good news for employers facing the tough reality of reductions in force. The Court's opinion in *Schoonmaker v. Spartan Graphics* clarified the plaintiff's burden in successfully bringing a claim of age discrimination in the context of a reduction in force. An age differential between employees laid off and employees retained is insufficient to sustain an age discrimination claim, even when the employees laid off were the oldest in the group and the decision maker fails to follow company policy in selecting the employees to be laid off.

In late 2006, Spartan Graphics experienced a slow down in the amount of available work. In an effort to cut costs, each manager was asked to identify potential areas for cost savings. After determining that the first and second shifts were the most productive, the bindery department manager decided to lay off two employees from the third shift. Schoonmaker was selected over another, younger employee, because she was sometimes hard to get along with, and the bindery manager thought that the younger employee was a better team player and more productive. Schoonmaker was 58 years old and had worked for Spartan Graphics for 11 years.

Spartan Graphics' employee handbook included a policy on staff reductions, which stated "the Company will attempt to identify employees who are the most qualified to perform the work available based on qualifications, productivity, attendance, general performance record and other factors the Company considers relevant in each case. When the Company considers these factors to be relatively equal, decisions will be guided by relative length of service."

Schoonmaker brought suit claiming that she had been selected for discharge over a younger employee due to her age. Spartan Graphics was granted summary judgment and Schoonmaker appealed.

In her appeal, Schoonmaker argued that the lower court had erred in disregarding evidence that: 1) a younger employee was retained in her position; 2) the two oldest employees were the ones selected for termination; and 3) the bindery manager had not followed the policy in the handbook for workforce reductions.

The Court of Appeals ruled that Schoonmaker had not sufficiently proven that she was replaced by a younger individual because she could not establish that another employee was hired or reassigned to perform her duties. As such, the Court of Appeals held that Schoonmaker had merely shown the existence of an age differential which was insufficient to establish Schoonmaker's case. In order to succeed, she would have to show something beyond an age difference.

As to Schoonmaker's claim that the lower court should have considered the fact that the two oldest employees were selected for termination, the Court of Appeals held that such a small statistical sample of only two employees does not prove discrimination. In response to Schoonmaker's claim that the bindery manager failed to consider the policy contained in Spartan Graphics' employee handbook, the Court of Appeals found determinative that the manager had considered the employees' qualifications and their ability to work together as a team. His lack of awareness of the specific policy did not give rise to an inference that his decision was motivated by Schoonmaker's age.

Lastly, Schoonmaker argued that she was a better worker than a younger worker and that Spartan Graphics had provided inconsistent reasons for her termination. The Court of Appeals dismissed this argument. Schoonmaker had not provided evidence to support her claim that she was a better worker. The Court acknowledged that shifting reasons for the adverse employment action, can on occasion, be evidence that the employer's stated reason for the adverse employment action is pretext. However, that was not the case in Schoonmaker's situation. The bindery manager was the ultimate decision maker and his justification for her selection for the reduction in force had always been based on productivity and Schoonmaker's inability to be a team player.

Ultimately, Schoonmaker's claim would have failed because Spartan Graphics could present a legitimate, nondiscriminatory reason for her termination. Schoonmaker was selected because she seemed to present more personnel problems than the younger employee. Although Schoonmaker disagreed with that assessment, the Court of Appeals specified that employers are not required to make perfect decisions or avoid preferences for certain employees. Employers are only prohibited from allowing impermissible, discriminatory reasons to motivate adverse employment actions such as hiring, terminating and promoting employees. Circumstantial evidence of age disparities and other irregularities will not necessarily be viewed as sufficient for a showing of discriminatory motives.

For questions about age discrimination contact Amanda Wickline or any member of SZD's Labor and Employment Practice Group. ■

Employers Must Exercise Caution When Monitoring Employee E-mails

By Erik Stock

Two recent cases have addressed the propriety of an employer accessing and retaining e-mails written or accessed by former employees using the employer's computer equipment, but which were ultimately stored on third-party servers (e.g. Hotmail, Gmail). Even though the cases do not apply Ohio law, they appear to indicate a larger trend toward limiting an employer's rights to such e-mails.

In *Pure Power Boot Camp v. Warrior Fitness Boot Camp* the United States District Court for the Southern District of New York held that an employer could not introduce into evidence e-mails stored by a former employee in the employee's non-work e-mail accounts. Pure Power Boot Camp filed suit against former employees after the employees left Pure Power's employ to begin a competing fitness business, allegedly stealing Pure Power's trade secrets and infringing upon its trademarks, trade dress and copyrights.

Pure Power's owner, Lauren Brenner, asserted that she was able to access one of the former employee's, Alexander Fell's, Hotmail account because at some point during his employment he had accessed that account from a computer owned by Pure Power. His login and password were automatically saved on the computer such that those fields were automatically populated when Brenner accessed the Hotmail website. Brenner further stated she found Fell's Gmail login information stored in an e-mail on his Hotmail account, and that she made a "lucky guess" at the password for an e-mail account Fell had set up for his newly created, allegedly competing, business (it turned out that all of Fell's passwords were identical).

Pure Power did have an e-mail policy included in its employee handbook, and Brenner cited that policy as authorizing her to access Fell's e-mail accounts. However, the court found that the policy was limited on its own terms to "company equipment" and that e-mails stored on third-party e-mail servers were outside the scope of the policy. The court took into consideration the fact that there was no evidence that any of the e-mails at issue were composed on, sent through or received on Pure Power's computer system. The act of leaving his Hotmail login accessible on Pure Power's computer system did not comprise consent for Brenner to read all of Fell's e-mails stored in his various accounts. It is interesting to note that a technical pleading error on the part of the defendants saved Pure Power from having to pay a damage award and attorneys' fees. While the court found that Brenner's actions constituted a violation of the federal Stored Communications Act (18 U.S.C. § 2701), and that the Act provides for the award of damages and reasonable attorneys' fees, the defendants failed to assert a cause of action under the Act.

Faced with similar facts the New Jersey Supreme Court, in *Stengart v. Loving Care Agency, Inc.*, held that e-mails sent by a former employee to her attorney using a Yahoo e-mail account were subject to the attorney-client privilege, even though there was evidence the e-mails were sent using a company-owned laptop computer.

Plaintiff Maria Stengart formerly worked as an executive director of nursing for defendant Loving Care Agency, Inc. Stengart was suing Loving Care for alleged violations of New Jersey's anti-discrimination law, and the opinion arose out of Stengart's motion to show cause why the e-mails were not returned by Loving Care after Stengart asserted the attorney-client privilege.

The e-mails came to Stengart's attention after Loving Care produced some of them in response to discovery. Loving Care obtained the e-mails in the first place by imaging the hard drive of the company-owned laptop assigned to Stengart after she filed her lawsuit, and then reading through the laptop's Internet browsing history. Much as in the *Pure Power* case, Loving Care asserted that its electronic communications policy made it clear that Stengart had waived any right to privacy in the e-mails when she sent them using the company-owned computer. However, Loving Care's policy allowed that "occasional personal use [of e-mail] is permitted."

Faced with these facts, the court found Stengart had a reasonable expectation of privacy in the e-mails exchanged with her attorney via the laptop issued to her by Loving Care because she used a personal, password-protected e-mail account instead of her company e-mail address and did not save the account's password on her computer. The court further held that Stengart's expectation of privacy was reasonable, given the language of Loving Care's electronic communications policy and the attorney-client nature of the e-mails. Concluding, the court wrote that its decision does not affect the rights of employers to monitor or regulate the use of workplace computers, and that companies may adopt lawful policies "to protect the assets, reputation, and productivity of a business and to ensure compliance with legitimate corporate policies." According to the court, an employer may enforce its computer-use policy by disciplining or terminating an employee who spends too much time exchanging e-mails with an attorney, but the employer may not have the right to review messages sent via web-based personal accounts.

For questions about an employer's right to access employee e-mails or other stored data, contact Erik Stock or any member of SZD's Labor and Employment Practice Group. ■

Ohio Supreme Court Sides with Painting Contractor in Dispute with Franklin County Commissioners

By John Krimm

In a highly-anticipated decision, the Ohio Supreme Court ruled on March 25, 2010, that the Franklin County Board of Commissioners abused its discretion when it rejected The Painting Company's low bid to perform work on the Huntington Park project due to "violations" of the State's prevailing wage laws. *State ex rel. Associated Builders & Contrs. of Cent. Ohio v. Franklin Cty. Bd. of Commrs.*, Slip Opinion No. 2010-Ohio-1199. Although the Court's decision is clearly a welcome "win" for The Painting Company, the narrow reasoning behind the decision re-affirms the right of local governmental bodies to apply bid evaluation criteria in determining the best bidder for public construction projects.

In October 2007, the Franklin County Board of Commissioners solicited bids for painting work in connection with the construction of the new county-owned Huntington Park baseball stadium. The Commissioners received two bids for the work. The lowest bidder was The Painting Company, a non-union shop. The other bidder was a union contractor. The Commissioners rejected The Painting Company's bid on the grounds that the Company failed to satisfy that portion of the County's bid evaluation criteria which made contractors who had violated the State's prevailing wage laws in a certain manner ineligible for a contract.

Subsequent to the Commissioners' actions, The Painting Company requested and received a formal bid protest meeting, at which the rejection of the Company's bid was affirmed. Thereafter, the Company appealed the Commissioners' decision, first to the Franklin County Common Pleas Court, then to the Tenth District Court of Appeals. Each time, the Commissioners' decision was upheld as a reasonable exercise of discretion. Subsequently, The Painting Company and the Associated Builders and Contractors of Central Ohio requested review by the Ohio Supreme Court.

The primary basis for the Supreme Court accepting review of the case was to determine whether Ohio's prevailing wage law, ORC Chapter 4115, preempted the County's bid evaluation criteria to the extent that the criteria conflicted with the statutory scheme. On this point, the Supreme Court sided with the County, finding no preemption. The Court determined that there was no need for a preemption analysis at all because the evaluation criteria were "not a municipal ordinance or similar provision having the force of law." Thus, the Home Rule Amendment to the Ohio Constitution, which limits the power of local governments to enact laws conflicting with the general laws of the State and which is the starting point for any preemption analysis, did not even apply.

Having sided with the County on this *legal* issue, the Court then turned to the *factual* question of whether the County abused its discretion in the way it applied its criteria to The Painting Company's bid. Here, the Court sided with the Company. At issue was the County's criterion that "the Bidder has not been debarred from public contracts or found by the state (after all appeals) to have violated prevailing wage laws more than three times in a two-year period in the last ten years." Characterizing the term "violated" as "imprecise," the Court concluded that this criterion "refers to the situation in which the director [of the Department of Commerce] makes a formal finding that a contractor or subcontractor *intentionally* violated the prevailing wage laws, and all appeals are exhausted." (emphasis added). The evidentiary record revealed that there had been 14 prevailing wage complaints filed with the Department of Commerce against The Painting Company. The Department had investigated these complaints and had found a number of violations which were either not intentional or resulted in no liability. Another group of complaints were investigated and settled without the Company admitting any wrongdoing. On the basis of this record, the Court said that rejecting The Painting Company's bid was an abuse of the Commissioners' discretion because the Commissioners, in effect, applied this criterion "to mean that *any* noncompliance with prevailing-wage laws by the bidder during the applicable time period was the equivalent of a prevailing-wage violation." (emphasis added).

The Supreme Court's decision in this case can be explained best by the old adage, "Bad facts make bad law." The Court noted that "The Painting Company was the lowest bidder on the project by a significant amount," that the Company had "a record of successful performance in projects similar to the Huntington Park project" and that "the Huntington Park construction manager and the [Commissioners'] own representative recommended that The Painting Company receive the contract." None of these facts were essential to the Court's legal analysis. In light of this, the Court's decision can be seen as a results-driven effort to right a particular instance of perceived unfairness while still preserving to the County Commissioners the legal authority to establish bidding criteria for public projects. The effect of the Court's decision on the evaluation of future bids remains to be seen.

For prevailing wage questions, contact John Krimm or any member of SZD's Labor and Employment Practice Group. ■

Employer Policies Need to Address Employee Internet Usage

By David Ball

Employer-provided Internet access has become standard for many types of jobs. With that access comes challenges for employers, from excessive personal use of that access on company time, including use of web-based personal e-mail accounts, to the posting of photographs and other information on social networking sites with which the company would rather not be associated. Many employers either lack comprehensive employee Internet use policies, or have policies that need to be updated to address social networking and other Internet use issues. The relationship between Internet use and employment issues is changing rapidly, as technological advances create a surge in opportunities and risks.

There is no reason to think that the pace of change, both technologically and legally, will slow down anytime soon. But that is no reason for employers to wait to adopt or revise employee computer use policies. About 72 percent of all companies are concerned that employee behavior on social media sites is putting the company at some kind of risk. The ease of electronic communication can jeopardize the security of company intellectual property and trade secrets.

Establishing policies that address current challenges will involve decisions such as whether to permit employee access to social networking sites using company systems. In 2009, 89 percent of all employers permitted employee access to Facebook on their company computers. This year, that percentage is down to 49 percent.

Updated computer use policies should address the following basic issues:

- The company's information technology (IT) systems are company property, with the result that the company has the right to monitor and review employee use of those systems, including any data stored by employees on the company's systems.
- Employees have no right or reasonable expectation of privacy in their use of the company's IT systems.
- Employees are to use the company's IT systems primarily (or exclusively) for business purposes.
- If personal use of company IT systems is permitted on a limited basis, the company has the right to restrict and impose limits on that use to prevent excessive or improper use.
- Use of the company's IT systems to access personal web-based e-mail and social media sites may be prohibited.
- Use of the company's IT systems for certain purposes, such as harassing, threatening or illegal behavior, is prohibited.
- Employees may not use the company's IT systems to access inappropriate websites, such as pornographic, gambling or offensive sites.
- Employees may sign an acknowledgement form that reminds the employee of key provisions in the computer use policy and includes the employee's agreement to monitoring of use of the company's IT systems, waiving confidentiality and privacy rights in such use.
- Company computers may be set up to have a pop-up consent form at login.

Employee computer use policies should be developed with full input from company IT staff, to incorporate their concerns and to make sure that IT systems operate consistently with the policy's restrictions and prohibitions. Though the pace of change in this area is rapid, now is the time to review and revise these policies. The legal risks won't wait.

For questions about social networking and electronic use policies contact David Ball or any member of SZD's Labor and Employment Practice Group. ■

News and Notes

On Dec. 14, 2009, **John Krimm** presented **"Labor Relations Under the Obama Administration: The Good, The Bad and The Ugly"** at the Ohio Contractors Association's Winter Conference in Columbus, Ohio.

John Krimm authored an article published in the January 2010 issue of *Ohio Contractor* titled: **"Labor Relations, Times, They are a Changin' Under Obama Administration."**

On March 23, 2010, (Columbus, Ohio) and March 25, 2010, (Cleveland, Ohio) SZD's Labor & Employment Practice Group presented "**Social Networking Brings New Challenges for Employers.**" Discussion leaders in Columbus were **Paul Bittner, Susan Porter, Angel Newcomb, Eve Ellinger** and **Tim Eckenrode**. Discussion leaders in Cleveland were **Paul Bittner, Aaron Granger** and **Tim Eckenrode**.

On April 21, 2010, SZD's Labor & Employment Practice Group presented "**Fundamentals of Employment Law in Ohio**" at a seminar sponsored by Sterling Education Services, Inc. in Columbus, Ohio ■

$1.5 Million Reasons Why Retaliation Claims Are on the Rise

By Aaron Granger

In January, a jury awarded $1.5 million in damages to a plaintiff who claimed she was wrongfully terminated in retaliation for telling her employer about sexual harassment by a supervisor. In *Crawford v. Metropolitan Government of Nashville*, the director of human resources heard rumors about a supervisor's inappropriate behavior and initiated an internal investigation. As part of the investigation Crawford was asked if she witnessed inappropriate behavior by the supervisor and she provided specific examples. After the investigation was complete Crawford was terminated for embezzlement and she responded with a lawsuit for retaliation.

Prior to trial, the case went to the U.S. Supreme Court to determine if Crawford's statements during the investigation entitled her to protection under the anti-retaliation provisions under Title VII of the Civil Rights Act. Crawford never actually initiated a formal complaint with her employer or the Equal Employment Opportunity Commission (EEOC). The Supreme Court concluded that she could pursue a retaliation action because her statements during the investigation were made "in opposition" to unlawful sexual harassment.

Retaliation claims are quickly emerging as the primary focus of claims being litigated against employers. In 2009, the largest number of cases filed with the EEOC involved retaliation, surpassing all other types of employment discrimination including cases based on race, sex or age. Plaintiffs are gravitating to this cause of action because it is easier to get beyond the historical barricades that would otherwise prevent discrimination claims from advancing to trial.

For example, under race discrimination claims a plaintiff must show that the adverse employment action caused a material change in the "terms and conditions" of employment. However, with retaliation claims, the plaintiff need only show that the adverse action is one that "might well have" dissuaded a reasonable person from making or supporting a charge of discrimination. Adverse action in this context does not have to occur at work, or be specifically related to a term or condition of employment.

Additionally, certain defenses that can be used to limit an employer's liability for traditional discrimination cases don't apply within the retaliation context. It is well established that employers can limit liability for sexual harassment by supervisors when no tangible adverse employment action has occurred as long as employers take "immediate and appropriate corrective action." However, in *Burlington Northern & Santa Fe Railway v. White*, the Supreme Court found that the employer's reinstatement of the plaintiff with full back pay prior to litigation did not prevent the plaintiff from recovering punitive damages for retaliation despite the fact that the employee was previously made whole.

With the rise of retaliation actions it is imperative that supervisors and human resource professionals seek competent legal guidance on: 1) how to handle complaints of discrimination; 2) conducting internal investigations; 3) responding to allegations; and 4) appropriate conduct during and after investigations have been completed.

For questions about retaliation claims contact Aaron Granger or any member of SZD's Labor and Employment Practice Group. ■

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