The Employment Brief

Updates in Labor and Employment Law to Help Your Business Succeed.

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The Supreme Court's Labor and Employment Docket

By Darrell VanDeusen

When the Supreme Court reconvenes on the first Monday in October, three employment cases will be waiting for the returning eight Justices and new Associate Justice Kagan. Will her presence on the bench change the result in these three cases? It seems unlikely.

Thompson v. North American Stainless, LP (09-291): Does Title VII create a cause of action for third-party retaliation for persons who did not themselves engage in protect activity?

In a 10-6 *en banc* decision, the Sixth Circuit held that Title VII does not create a cause of action for third-party retaliation for persons who did not themselves engage in protected activity. Thompson alleged that he was terminated in retaliation for his co-worker's (and fiancée's) filing of an EEOC charge of sex discrimination. North American Stainless claimed that the firing was performance-based.

Thompson sued, claiming a retaliatory discharge under Title VII, based on the protected activity of his fiancée. The trial court granted the employer's motion for summary judgment. The Sixth Circuit affirmed and described the sole issue as whether Title VII permits a cause of action for third-party retaliation for persons who did not engage in protected activity.

The rub is that because Thompson did not allege he personally engaged in any protected activity (that is, he did not oppose or participate in any Title VII protected action) the court held that he could not claim retaliation. Simply put, he was not among the class of people for whom Congress created a retaliation cause of action. Other Circuits have agreed.

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VERIZON OFF THE HOOK FOR BILLION DOLLAR DRAFTING ERROR

By Michael Severino

There are few legal errors that could match the one Verizon committed when drafting a multi-billion dollar pension plan. Luckily for Verizon, the Seventh Circuit Court of Appeals, in *Young v. Verizon's Bell Atlantic Cash Balance Plan*, ___ F.3d ___, Nos. 09-3872 & 09-3965 (7th Cir. Aug. 10, 2010), excused the mistake and permitted Verizon to reform its pension plan. Regardless, this case demonstrates that even the biggest corporations can commit profound blunders.

Bell Atlantic, Verizon's predecessor, operated the Bell Atlantic Management Plan until 1996, at which time it adopted a new pension plan. Part of the transition to the new plan was the conversion of participants' cash balances from the old plan to the new plan. To

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Supreme Court

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Three dissents from the *en banc* panel argued that: (1) the Supreme Court's decision last year in *Crawford v. Metro Gov't of Nashville*, 129 S. Ct. 846 (2009) found the meaning of "oppose" ambiguous; (2) the primacy of statutory purpose and a broad approach should apply in interpreting statutes meant to protect employees against employer retaliation for protected activity; and (3) Thompson was a person claiming to be aggrieved (injured or wronged in his rights) under 42 U.S.C. § 2000e-5(b).

Here's a twist: the Solicitor General (now Justice Kagan) filed a brief recommending that certiorari be denied.

Kasten v. Saint-Gobain Performance Plastics Corp (09-834): Is an oral complaint protected conduct under FLSA's anti-retaliation provision?

Kasten sued Saint-Gobain, claiming that he was fired in retaliation for making verbal complaints to his superiors that the employer's placement of time clocks violated the FLSA. The district court granted summary judgment for the employer, and the Seventh Circuit affirmed.

The FLSA's anti-retaliation provision prohibits an employer from retaliating against an employee because (among other things) the employee "has filed any complaint . . ." 29 U.S.C. § 215(a)(3). The Seventh Circuit held that "any complaint" includes an internal complaint, and noted that most other Circuits have agreed with this interpretation. The court also held that an employee who only orally complains does not "file" a complaint, reasoning that "the natural understanding of the phrase 'file any complaint' requires the submission of some writing to an employer, court, or administrative body."

A rehearing *en banc* was denied and the judges dissenting to that denial claimed that the Seventh Circuit "has adopted a construction of the Fair Labor Standard Act's anti-retaliation provision that is unique among the circuits."

Staub v. Proctor Hospital (09-400): When may an employer be held liable based on the unlawful intent of officials who caused or influenced but did not make the ultimate employment decision?

This is known as a "cat's paw theory" case. The Supreme Court has considered whether to weigh in on this issue before and has not done so.

Staub sued his employer, claiming that he was fired in violation of USERRA. He won at trial, but the Seventh Circuit reversed. Staub had proceeded on the theory that the discriminatory animus of a non-decision maker can be imputed to the decision maker where the former has "singular influence" over the latter, and uses that influence to cause an adverse employment action.

The Seventh Circuit held that, prior to admitting evidence of non-decision maker animus, a trial court "should determine whether a reasonable jury could find singular influence on the evidence to be presented." The court suggested that "[a]llowing the jury to entertain the cat's paw theory and decide whether there was singular influence," is acceptable, but "only upon a prior determination that there is sufficient evidence for such a finding. . ."

In this case, the court concluded that the trial court erred by neglecting to make the primary determination, and found that there was insufficient evidence of the "singular influence" to allow evidence of non-decision maker animus to be presented to the jury.

PHARMACEUTICAL SALES REPRESENTATIVES ARE ENTITLED TO OVERTIME PAY

by Kelly Hoelzer

Whether employees are exempt from overtime pay under the Fair Labor Standards Act ("FLSA") continues to be a hot litigation topic. Recently, there have been several well-publicized, multi-million dollar verdicts against employers in class action lawsuits brought by employees challenging whether they are exempt from the overtime provisions of the FLSA. One current FLSA litigation trend involves the challenge raised to pharmaceutical companies that treat their sales representatives as exempt, either as outside salespersons or administrative employees.

The FLSA's outside sales exemption covers employees who spend a majority of their time outside of the office, soliciting orders or making sales for their employer. Employees who are administratively exempt must meet different criteria: (1) they must primarily perform office or non-manual work directly related to the employer's general business operations; and (2) their primary duty must include the exercise of discretion and independence judgment with respect to matters of significance. Due to the highly regulated nature of their industry, however, pharmaceutical sale representatives cannot sell directly to doctors or to patients. The question has arisen, therefore, whether pharmaceutical sales reps actually "sell" for the purposes of the outside salesperson exemption. If they do not, do they exercise sufficient discretion and independent judgment to be considered exempt as administrative employees?

Sales Reps Entitled to OT

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The first federal appellate court to consider the issue has answered "no" to both questions. In *In re Novartis Wage and Hour Litigation*, No. 09-0437 (2d Cir. July 6, 2010), the Second Circuit held that sales representatives employed by pharmaceutical giant, Novartis Pharmaceuticals Corporation ("Novartis"), were not exempt under the FLSA as either outside salespersons or administrative employees, and thus were entitled to overtime pay.

Novartis employs approximately 6,000 sales representatives ("Reps") nationwide to facilitate sales of its products. The Reps do not sell Novartis drugs directly to physicians or patients, as doing so is prohibited under federal regulations. Instead, the Reps try to obtain a commitment from the doctors they visit to prescribe particular Novartis drugs. Novartis actually sells its products to drug wholesalers, which, in turn, sell to retail pharmacies.

The Novartis court found that the Reps' job duties fell short of the regulatory definition of "outside sales." Under DOL regulations, an outside sales employee's primary duty is "to make sales or to obtain orders or contracts for services" – meaning that the employee must obtain a commitment to buy from a customer and be credited with the sale. While the physician relationship is an "essential step in the path that leads to the ultimate sale of a Novartis product to a patient," the Second Circuit held that the dealings between the Reps and physicians are "less than a sale" as defined by the DOL regulations. As such, the Circuit Court held that the Reps were not exempt as outside salespersons.

The Novartis court also held that the Reps were not administratively exempt because their primary duties did not involve the required exercise of discretion and independent judgment on matters of significance. The Reps contended that they acted as "robots," doing "low-level, discretionless marketing work, strictly controlled by Novartis." After analyzing their specific job duties, the court agreed, holding that while the Reps exercise some level of discretion and judgment, they do so within "severe limits imposed by Novartis." As a result of Novartis's overall control of the Reps' activities, the court held they do not exercise sufficient discretion or independent judgment to meet the requirements of the administrative employee exemption.

Verizon Dodges Drafting Bullet

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accomplish this, Verizon utilized a series of multipliers based on participants' ages and years of service. In essence (and greatly simplified), a participant's cash account was multiplied by a variable to calculate the new account balance. At least, that was Verizon's intent. The plan language that was finally implemented actually utilized the multiplier twice. Obviously, this would provide the participant with a much greater plan balance than Verizon had intended. Verizon realized the error and corrected it in later versions of the pension plan, but made no efforts to correct the previous plan until Ms. Young brought suit. In the interim, Verizon sent account statements to plan participants setting forth their account balances calculated with the correct multiplier. No participant challenged those balances or claimed that he or she was entitled to the double multiplier.

Ms. Young, however, thought otherwise. She claimed that under ERISA's strict rule requiring adherence to the plan documents, she should be entitled to the double multiplier as provided by the plan. The district court agreed, sort of. While the district court ruled that Verizon improperly ignored the double multiplier set forth in the plan documents, the court hinted that Verizon would have to seek equitable reformation of the plan. Of course, Verizon did just that.

ERISA permits a plan fiduciary to bring an action for appropriate equitable relief. Cases from around the country have either endorsed relief in certain circumstances for a "scrivener's error" or have not foreclosed such relief. The court noted, however, that in order to prevail on a claim for equitable relief, Verizon would have to convince the court by "clear and convincing evidence" that the plan contains a scrivener's error that does not reflect the participants' reasonable expectation of benefits. The court also noted that such evidence must be objective and not dependent on an interested party.

Verizon offered evidence to meet this burden. Verizon demonstrated that the double multiplier appeared for the first time in the fourth draft of the plan as a result of formatting changes, and also established the absence of any evidence to indicate that the change was intentional or the result of Verizon's desire to increase benefits. Furthermore, the communications and dealing between participants and Verizon show that the parties meant, and expected, that the plan would use a single multiplier. The participants received plan brochures and account statements that utilized a single multiplier. Finally, no participant, prior to Ms. Young, claimed that his or her account balance was incorrect due to the use of the single multiplier. The district court, and the Seventh Circuit, ruled that Verizon met its burden in showing that the plan should be reformed to utilize only a single multiplier.

Sexual Harassers Lose Out On Their Sex Discrimination Claim

by Randi Klein-Hyatt

In the course of deciding to terminate an employee who has violated a sexual harassment policy, I have often had clients ask me about the risk of liability if the terminated employee (typically male) were to sue over his termination. The Ninth Circuit, in *Hawn v. Executive Jet Management, Inc.*, __ F.3d ___, No. 08-15903 (9th Cir. Aug. 16, 2010), was faced with this exact question arising from a factual scenario that many employers likely have (or will) experience.

Three male pilots were fired after a female flight attendant had accused them of sexual harassment. The company ultimately had an outside consultant investigate the flight attendant's claims. In the course of the investigation, the investigator was not able to corroborate all of the harassment allegations raised, but was able to corroborate some of them. Interestingly, during the investigation, it was also discovered that the female flight attendant was, at times, a willing participant in some of the sexual banter, and had even initiated some of the dialogue. The female flight attendant, however, was not disciplined for that behavior.

While the investigator did not ultimately recommend that the three male pilots be terminated, the charter airline company erred on the side of caution and terminated them anyway. The company was sued for Title VII sex discrimination in any event, except the plaintiffs were the male pilots. The terminated pilots argued it was "risk free" for the company to terminate "young, white, American males" while ignoring female employees' comparable conduct (the complaining flight attendant and some other flight attendants had apparently engaged in sexual banter with the pilots). The plaintiffs claimed that the flight attendants who engaged in sexually inappropriate behavior, but were not disciplined, were similarly situated females who were treated more favorably. Thankfully, the trial court and the Ninth Circuit did not agree.

Specifically, the Ninth Circuit held that the male pilots and the female flight attendants could not be considered "similarly situated" because the male pilots' conduct gave rise to a sexual harassment complaint, while the female flight attendant's conduct never triggered such a complaint. Courts have routinely recognized that the "presence of complaints" about an employee's behavior is a "distinguishing factor" and in this case, made the two groups of employees not "similarly situated" for purposes of a Title VII sex discrimination analysis. Further, the harassment complaint and the ensuing investigation were a significant contrast to any comparable complaint or investigation of the female employees' behavior.

Not wanting to encourage a "race to the Human Resources office," the Ninth Circuit noted that the existence of a complaint may not always be material or determinative in light of all the facts. In this case, however, the male pilots never complained about the female flight attendants' behavior until well after the fact in a defensive move, and even during the course of the company's investigation into the pilots' alleged harassment of the flight attendants, the pilots did not file any complaint against the females or suggest that they found the females' conduct unwelcome. In the end, the Ninth Circuit confirmed that Executive Jet did not violate Title VII by firing the pilots after an outside investigation concluded there was a violation of the company's sexual harassment policy.

Urine Trouble

by Pete Sauciet

Captain Joseph Kinneary, who piloted a sludge boat for the City of New York, fell within the jurisdiction of the United States Coast Guard for drug testing. In particular, the Coast Guard requires that Captains provide urine samples for testing on a regular basis. It turned out that Captain Kinneary has "shy bladder syndrome." Stated simply, he is unable to pee on command, even if that takes hours.

Captain Kinneary's problem did not allow him to urinate within three hours of command, as required by the Coast Guard. Captain Kinneary always was able to pass drug tests by giving saliva, blood, and hair samples. In fact, those samples were tested over the course of years and always showed him negative for drugs. Still, he could not necessarily urinate within three hours. The Coast Guard determined that Captain Kinneary's inability to provide a urine sample meant that he could not continue to captain a sludge boat. As a result, Captain Kinneary was terminated because "his inability to perform the duties of [his] title of 'Captain'" rendered him "incompetent."

Captain Kinneary sued his employer under the Americans with Disabilities Act. Captain Kinneary contended that he could perform the essential functions of a sludge boat captain, even passing drug tests taken through saliva, blood and hair samples. The federal courts ruled against Captain Kinneary, and in favor of the employer, because it was the Coast Guard that removed Captain Kinneary's license to drive a sludge boat. Because Captain Kinneary was not Coast Guard certified, the employer could not be held responsible.

California Supreme Court Sides With Employers In Tip Pooling Case

by John Bolesta

For years, employee tip pools have provided the plaintiff's bar with a seemingly never-ending supply of clients. That is, until recently. The California Supreme Court has, at least temporarily, shunted the growth of this cottage industry in that state. In *Louie Hung Kwei Lu v. Hawaiian Gardens Casino, Inc., et al.*, 2010 Cal. LEXIS 7623 (August 9, 2010), the California Supreme Court concluded that California Labor Code Section 351 does not provide a private cause of action for employees to recover any misappropriated tips from employers.

Although "tip pooling," which is a system of sharing tips among employees who contribute to customer service, has been recognized in California and other states as an important tool for ensuring that patron tips are shared equitably by deserving employees, class actions have challenged this practice. In the *Lu* case, Plaintiff Louie Lu was a card dealer at Defendant Hawaiian Gardens Casino, Inc. The Casino had a written tip pooling policy that required dealers to set aside 15-20% of the tips received each shift, which were deposited into a "tip pool bank account" and later distributed to designated customer service employees. The tip pool policy expressly prohibited employers, managers, and supervisors from participating in the tip pool. Plaintiff brought a class action against the Casino and its general manager alleging, among other things, that the Casino's tip pooling policy violated the employee protections under Labor Code § 351 (prohibiting employer from taking, collecting or receiving employees' gratuities).

The California Supreme Court rejected Lu's claim, holding that § 351 did not provide a private right of action. The Court noted that the penalties for violating the statute are stated clearly in the statute itself: Section 351 provides that an employer who violates § 351 is guilty of a misdemeanor, and can be fined or even imprisoned. The Court also extended an olive branch to the plaintiff's bar, stating that the "holding that Section 351 does not provide a private cause of action does not necessarily foreclose the availability of other remedies. To the extent that an employee may be entitled to certain misappropriated gratuities, we see no apparent reason why other remedies, such as a common law action for conversion, may not be available under appropriate circumstances." It is likely that legislation will be quickly introduced in the California State Legislature to fix this "glaring" oversight, especially because intermediate appellate courts and trial courts in California have assumed a private cause of action exists under Section 351.

DOT Revises Drug Testing Regulations

by Eric Paltell

Companies who employ persons with Commercial Driver Licenses ("CDLs") are well aware of the drug testing requirements mandated by the United States Department of Transportation ("DOT") regulations. Effective October 1, 2010, covered employers will have to make changes to DOT mandated drug testing as a result of new rules being implemented by the Department of Health and Human Services.

Most of the changes required in the new regulations are technical changes which apply to the testing process itself. There are no changes in terms of the circumstances under which an employer must test, or the classes of employees who must be tested.

The key changes are as follows:

- DOT now requires testing for ecstasy ("MDMA");
- The test cut-off concentration for cocaine has been lowered;
- The test cut-off concentration for amphetamines has been lowered; and
- Initial testing for certain metabolites of heroine is now required.

The DOT has also modified and added to the definitions used in the regulations. For example, there are revised definitions of the terms "adulterated specimen," "confirmatory drug test," "initial drug test," "invalid drug test," "laboratory," and "limit of detection." New definitions have been added for certain terms, including "negative result" and "positive result." Additionally, the DOT has revised the rules regarding training of Medical Review Officers ("MRO").

Any employer who has a DOT mandated drug and alcohol testing program in place needs to review and revise its regulations to ensure compliance on or before the October 1, 2010 deadline.

Court Rejects Harassment Claim

by Cliff Geiger

Nearly 25 years after the Supreme Court recognized a cause of action for sexual harassment in the workplace, the law in this area continues to evolve. A recent case from the United States Court of Appeals for the Eighth Circuit underscores the high standard required to establish a hostile work environment claim, and the importance of having an anti-harassment policy in place. *Cross v. Prairie Meadows Racetrack & Casino, Inc.* 109 FEP Cases 1712 (8th Cir. 2010).

Lucy Cross worked at Prairie Meadows Racetrack & Casino as a valet. She parked cars on the night shift from August 2005 until September 2007.

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Harassment Claim Fails

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Cross left and sued Prairie Meadows for subjecting her to a sexually hostile work environment. The claim was based primarily on Cross's interaction with another valet named Semsudin Rizvic. According to Cross, over the course of two years Rizvic: (1) pulled her by her ponytail out of the shack where customer keys were stored; (2) brushed the back of his hand across her breast in a purported attempt to wipe something off her shirt; (3) responded in an angry and physically threatening manner when she told him she did not want to be "more than friends;" and (4) spread a rumor that she performed oral sex on him. All of these incidents were reported to the company, but only two of them were meaningfully addressed. During the course of her lawsuit, Cross described other incidents of sexual harassment allegedly perpetrated by Rizvic, as well as others, which she did not report while working at Prairie Meadows.

Treating the reported and unreported harassment separately, the district court concluded, and the appeals court agreed, that the reported harassment was not so severe or pervasive that it created a hostile work environment. The courts also agreed there was no evidence that Prairie Meadows knew or should have known about the unreported harassment. The courts further concluded that even if the harassment was severe or pervasive, Cross could not show that Prairie Meadows failed to take appropriate remedial action.

At the time of hire, Cross had been provided a copy of the company policy regarding harassment and violence in the workplace. The policy explained that Prairie Meadows had a zero tolerance for sexual harassment and explained several ways employees could seek help if they experienced inappropriate behavior, including addressing concerns directly with the CEO. The policy provided that any member of management who received a complaint was required to forward the complaint to Human Resources.

Cross informed Traffic Supervisor Tony Fucaloro about her difficulties with Rizvic. In response to the hair pulling complaint, Fucaloro called all of the valets together and warned them to avoid horseplay. Fucaloro discussed the hand brushing incident with Rizvic, but he accepted Rizvic's explanation. When told of Rizvic's angry reaction to Cross saying she did not want to be more than friends, Fucaloro told Cross, "that's just Sam." None of these complaints was forwarded to Human Resources.

While Fucaloro's responses may not have been ideal, they did not create liability either. Fucaloro did not view the hair pulling complaint as an allegation of sexual harassment, and he responded adequately by admonishing all of the valets against horseplay. With regard to the second and third complaints, the court noted that Fucaloro would have been well advised to take them more seriously, but the evidence was not sufficient to establish a Title VII violation. In this regard, Cross was faulted for failing to act reasonably. Cross knew other avenues of relief were available if she was unsatisfied with Fucaloro's response, yet she never took any additional steps.

Cross's fourth complaint, that Rizvic had started a rumor about her performing oral sex, was referred to Human Resources for investigation. Rizvic denied starting the rumor and was supported by another employee, but he was terminated for other conduct that occurred during the course of the investigation.

In addition to her dissatisfaction with Fucaloro, Cross contended the company's response to her complaints was inadequate because they were not forwarded to Human Resources as required by company policy. The court disagreed, writing:

"[T]he obligations of an employer under Title VII are not defined by the strictures of its own policy on harassment. Although an employer's failure to adhere to its internal policies may be relevant in some cases, it does not follow that a violation of an internal reporting procedure automatically establishes a failure to take appropriate remedial action under federal law. Employers are free to draft harassment policies that are more stringent than Title VII, and they should be permitted to do so without fear that they will incur additional liability as a result of their efforts."

Title VII encourages the creation of effective ant-harassment policies. Employers that adopt such policies can reduce their risk of liability under Title VII without worrying that a failure to follow procedures exactly will create additional liability. Liability for workplace harassment will depend not on whether the anti-harassment policy is meticulously followed, but whether, upon learning of inappropriate conduct, the employer takes prompt remedial action reasonably designed to end the harassment.