DAY PITNEY LLP

Boston News

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A LETTER FROM OUR BOSTON OFFICE ADMINISTRATIVE PARTNER

Dear Friends,

Thirty years ago, Ronald Reagan was president, a gallon of gas cost $1.40, "Raiders of the Lost Ark" premiered, Justin Timberlake was born, and Day Pitney opened its Boston office.

So many aspects of our practice have changed in those 30 years, some obvious and some less so. Our office has expanded from three lawyers to nearly 40, and a firm that had just two offices in two states now has nine offices in Massachusetts, Connecticut, New York, New Jersey, and Washington, DC. Our Boston office is now located in Tower 1 of International Place, an award-winning building in the Financial District that did not exist in 1981. Perhaps the most significant changes have come in the way technology has altered how we do business (leaving aside how it has radically changed the other aspects of our lives). In 1981, law firms were still using electric typewriters. There was no e-mail, no Internet, and, of course, no BlackBerrys to access either of them. Fax machines had not yet become widespread, and law firms still made regular use of something called the telex.

Despite all the significant changes in the way we practice law, one thing that remains unaltered is our devotion to you, our clients. Some of you have been with us from the beginning; others have only engaged us recently. Either way, it is our determination to provide each of you with outstanding client service that motivates us every day.

We wish to mark the occasion of our 30th anniversary in Boston by thanking you for your support of our firm and this office. We look forward to helping with your legal needs for many years to come.

Best regards,

Jonathan Handler

BOSTON OFFICE NEWS

IN-DEPTH COVERAGE

Supreme Court Weighs In On Key Employment Issues

Article by **John P. McLafferty**

Over the past few years, the U.S. Supreme Court's docket has been chock-full of cases addressing significant labor and employment issues. This term has been no exception. So far in 2011 the Court has issued a number of noteworthy opinions, three of which are discussed here. Several more opinions are expected before the Court's term ends in June, including a decision relating to the largest employment class action in history.

Thompson v. North American Stainless, LP

On January 24, 2011, the Court continued its recent trend of broadening the protections for individuals who allege retaliation for opposing discrimination in the workplace. In *Thompson v. North American Stainless, LP*, the Court held that Title VII of the Civil Rights Act permits a retaliation claim for an employee who alleged that he was fired from his job because his fiancée had filed a sex discrimination charge against the employer for whom they both worked. Miriam Regalado and her fiancé, Eric Thompson, were both employed by North American Stainless. Regalado filed a sex discrimination charge with the Equal Employment Opportunity Commission and, three weeks later, the company fired Thompson. Thompson then brought his own EEOC charge and subsequent lawsuit, claiming that he was fired in retaliation for Regalado's EEOC charge. The Sixth Circuit Court of Appeals dismissed Thompson's claim because Thompson himself had not participated in protected activity; that is, he had not opposed any discriminatory conduct or made any complaint concerning his fiancée's treatment.

In a unanimous decision, the Supreme Court reversed the Sixth Circuit and held that Title VII covers third party retaliation claims, entitling Thompson to pursue his lawsuit. In reaching its decision, the Court noted that firing an employee's fiancé is conduct that would have the effect of dissuading a reasonable person from engaging in protected activity and thus could constitute retaliation. Moreover, the Court held, Thompson was a "person aggrieved" within the meaning of Title VII because he was allegedly fired as a means of retaliation against his fiancée, who had participated in protected activity, and thus Thompson fell within that statute's "zone of interest." Although the Court stated that retaliation against close family members would most likely be sufficient to state a retaliation claim, it stopped short of identifying a fixed class of relationships for which third party claims are permitted.

In light of this ruling, employers should ensure that employment actions are based on legitimate business reasons, and that managers understand that retaliation is prohibited not only against employees who engage in protected conduct but also against close friends and family members of those employees.

Staub v. Proctor Hospital

On March 1, 2011, in *Staub v. Proctor Hospital*, a unanimous Court recognized the so-called "cat's paw" theory of liability and held that an employer can be held liable for discrimination where an adverse employment decision is influenced by a supervisor's discriminatory intent, even where the ultimate decision maker had no discriminatory animus.

The term "cat's paw" comes from a fable in which a monkey persuades a cat to pull chestnuts from a fire. The monkey ultimately gets away with the chestnuts, while the cat is left with nothing but a burnt paw. In *Staub*, the plaintiff employee sued his former employer under the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"), claiming that the human resources executive who fired him was merely the "cat's paw" of his direct supervisors, who had openly expressed anti-military sentiment. The Court found that if an action by a biased supervisor is the proximate cause of an employee's termination, then the employer can be held liable for discrimination, even if the ultimate decision maker had no discriminatory intent and was unaware of the supervisor's bias. Although the Court allowed for the possibility that an employer could escape liability by conducting an independent investigation, thus eliminating the possibility that an unknown bias infected the decision, it provided little guidance to employers regarding the circumstances under which such an investigation could insulate them from liability.

This decision highlights the need for employers to ensure that procedures are put into place to reduce the chances that biased or discriminatory input from even one supervisor can taint disciplinary or other employment processes involving multiple decision makers and layers of review.

Kasten v. Saint-Gobain Performance Plastics Corp.

In a 6-2 decision, on March 22, 2011, in *Kasten v. Saint-Gobain Performance Plastics Corp.,* the Court held that oral complaints relating to wages and hours of employment constitute protected conduct under the anti-retaliation provision of the Fair Labor Standards Act ("FLSA"). The employee, Kasten, filed suit against his employer after he was fired allegedly for complaining orally to his supervisors and human resources representatives that the company's placement of time clocks violated the FLSA. The Seventh Circuit dismissed Kasten's claim, holding that the FLSA protects from retaliation only an employee who "filed any complaint" under the statute. Because Kasten never reduced his complaint to writing, the Seventh Circuit reasoned, he had not "filed" any complaint and thus had not participated in protected activity.

The Supreme Court reversed the Seventh Circuit, holding that the FLSA's "file" language did not limit complaints to those made in writing and that holding otherwise would undermine the statute's objectives and adversely effect enforcement of its protections. The Court made clear, however, that not just any oral complaint is sufficient. Rather, to serve as the basis for a retaliation charge, the oral complaint requires "some degree of formality" sufficient to put the employer on fair notice that the employee is asserting rights protected by the FLSA. Accordingly, the Court remanded the case to the District Court to assess whether Kasten's complaints met that standard.

Of note, the only question before the Supreme Court in Kasten was whether the FLSA prohibited retaliation against employees who make purely oral complaints about alleged violations of federal wage and hour law. The

majority decision of the Court did not address an alternative challenge, raised late by the employer, that the anti-retaliation provision of the FLSA only protects complaints filed with governmental agencies. That argument, which was cited with approval in the dissent by Justice Scalia, presumably will be heard on remand. In the meantime, the practical significance of Kasten is that employers should not take adverse action against an employee for making a complaint that reasonably could be construed to assert a wage claim, whether the complaint is oral or in writing. In addition, employers should ensure that supervisors are trained to recognize when complaints reasonably could be viewed as raising FLSA issues and that all complaints are taken seriously and promptly investigated.

Wal-Mart v. Dukes

On March 29, 2011, in one of the most highly anticipated employment cases in years, the justices heard argument in *Wal-Mart v. Dukes*, a putative class action alleging gender discrimination on behalf of 1.5 million current and former Wal-Mart employees, with potentially billions of dollars in damages at issue. The Supreme Court will determine whether the Ninth Circuit properly certified the class and is expected to address the standards for class certification. A decision in the case is expected in late June.

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