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LEGAL AND LEGISLATIVE UPDATE

The following is provided as a complimentary service to the firm's clients. It is designed to assist the reader in keeping informed of selected developments in employment law. It is not intended to be nor is it a treatment of all new developments in the field of labor and employment law. Applicability to a particular situation depends upon an investigation of the specific facts and more exhaustive study of the applicable laws than can be provided in this format. This summary is not intended to be a substitute for legal advice.

Miscellaneous

Has the EEOC Identified a New Form of Discrimination?

The EEOC is now investigating whether employers and recruiters are unlawfully barring the unemployed from applying for jobs. Allegations are that employers and recruiters are refusing to consider for employment, anyone who has been unemployed. The EEOC is concerned that such practices may have a disparate impact on African-Americans, Latinos and other ethnic minorities who tend to have a higher jobless rate, and the disabled and older workers. On February 16, the EEOC began holding hearings in Washington, D.C. to review the evidence. However, both the EEOC and the Labor Department said they do not have much data to determine if the practice is widespread. The National Employment Law Project submitted one Internet help-wanted ad to the Commission

in which a staffing company seeking to hire paralegals stated that "to be considered, candidates must be currently employed."

The EEOC is going to take a close look at these reports and decide if standards need to be clarified. Anti-discrimination laws do not explicitly ban companies from excluding applications from the unemployed, but actions that put a protected group of applicants at a disadvantage can be illegal.

WARN Act Case of First Impression

A Pacific Northwest car dealer, Gee West Seattle, had approximately 150 employees when it announced that it would be closing in 11 days unless it could find a buyer. Following the announcement, many employees started looking for other jobs and some just stopped coming to work to the point that only 30 workers remained. The company closed, and argued that it no

longer met the WARN Act's 50-employee threshold for coverage. The district court agreed, concluding that the employees who left their jobs during the interim period did not suffer an "employment loss" because they had left voluntarily. But, along comes the Ninth Circuit Court of Appeals and reverses that ruling. Writing for the panel, Circuit Judge N.R. Smith called it "unreasonable" to assume that the employees voluntarily departed. "The unexpected and urgent need to find new employment," he said, "is exactly the type of pressure that Congress was attempting to eliminate by creating the WARN Act." Judge Smith added that Gee West's argument, that only 30 employees lost their jobs as a consequence of the plant closing, is not credible. He explained that whether it was a "notice of potential sale" or "potential closure," the notice stated that the company would be closing its doors at the end of business on Oct. 7. "Such a notice," Judge Smith continued, "would certainly create a reasonable expectation of employment loss among Gee West's current employees."

In dissent, Chief U.S. District Judge Richard Cebull, sitting by designation, voiced a different view. He wrote that the majority opinion established a new bright-line rule that workers who abandon their jobs because the business is closing have not "voluntarily departed." If Congress intended that every employee who leaves a job upon notice that the business is closing has not "voluntarily departed," Judge Cebull added, then the WARN Act would say so. *Collins v. Gee West Seattle, LLC*, No. 09-36110 (9th Cir. Jan. 21, 2011)

Cat's Paw and USERRA

On March 1, 2011, the U. S. Supreme Court ruled that, in a dispute involving the scope of the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), if a supervisor performs an act motivated by anti-military animus that is intended by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate

employment action (i.e., the cat's paw), then the employer is liable under USERRA.

Vincent Staub worked as an angiography technician for Proctor Hospital until 2004, when he was fired. He was also a member of the United States Army Reserve, which required him to attend drill one weekend per month and to train full time for two to three weeks a year. His supervisors frequently scheduled him to work at the last minute on drill weekends so Staub would have to pay back the department for everyone else having to bend over backwards to cover his schedule for the weekend. One of his supervisors referred to Staub's military obligations as "a bunch of smoking and joking and a waste of taxpayers' money." The supervisors disciplined Staub for frequently being unavailable and instructed him to notify them when he left his work area. Staub alleged that he complied with that requirement but the supervisors told human resources otherwise. The human resources director relied on the supervisors' accusations, and after reviewing Staub's personnel file, she decided to fire him. The Seventh Circuit Court of Appeals observed that Staub had brought a "cat's paw" case," meaning that he sought to hold his employer liable for the animus of a supervisor who was not charged with making the ultimate employment decision. It explained that under Seventh Circuit precedent, a "cat's paw" case could not succeed unless the non-decisionmaker exercised such "singular influence" over the decisionmaker that the decision to terminate was the product of "blind reliance."

USERRA provides that "An employer shall be considered to have engaged in actions prohibited ... under subsection (a), if the person's membership ... is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership." §4311(c).

The Court therefore held that if a supervisor performs an act motivated by antimilitary animus that is *intended* by the supervisor to cause an adverse employment action, and if that act is a

proximate cause of the ultimate employment action, then the employer is liable under USERRA. In a concurring opinion joined by Justice Clarence Thomas, Justice Samuel Alito said he would hold that an employer is not liable under the “cat’s paw” theory when the unbiased official who makes the termination decision conducts “a reasonable investigation” and does not just “rubberstamp” the allegedly biased supervisors’ findings. *Staub v. Proctor Hospital*, 111 FEP Cases 993, No. 09–400 (3/1/11)

Fair Labor Standards Act

U.S. Supreme Court Says Oral Complaint is Good Enough to Support Retaliation Claim

The Fair Labor Standards Act contains an anti-retaliation provision that forbids employers “to discharge or in any other manner discriminate against any employee because such employee has *filed any complaint* or instituted or caused to be instituted any proceeding under or related to [the Act], or has testified or is about to testify in such proceeding, or has served or is about to serve on an industry committee.” § 215(a)(3). The Supreme Court was asked whether “an oral complaint of a violation of the Fair Labor Standards Act” is “protected conduct under the [Act’s] anti-retaliation provision.” The Court found that it is. The Court acknowledged that the Act prohibits employers from discriminating against an employee “*because* such employee has filed any complaint.” And it is difficult to see, the Court said, how an employer who does not (or should not) know an employee has made a complaint could discriminate *because* of that complaint.

The statutory term “filed any complaint” contained in the FLSA’s anti-retaliation provision includes oral as well as written complaints within its scope. The Court said that several functional considerations indicate that Congress intended the anti-retaliation provision to cover both oral and written complaints and that an interpretation that limits the provision’s coverage to written complaints would undermine the Act’s basic objectives and take away needed flexibility from

government agencies charged with the Act’s enforcement. An oral complaint is capable of giving the employer fair notice that a grievance has been lodged. The Secretary of the Department of Labor and government agencies have consistently held the view that the term at issue covers not only written but oral complaints and their interpretation is reasonable and consistent with the Act.

Justice Scalia, with whom Justice Thomas dissented said that they would affirm the judgment of the Seventh Circuit Court of Appeals on the ground that § 215(a)(3) does not cover complaints to the employer at all but only to the government. “First, every other use of the word ‘complaint’ in the FLSA refers to an official filing with a governmental body... Second, the word ‘complaint’ appears as part of the phrase ‘filed any complaint’ and thus draws meaning from the verb with which it is connected. The choice of the word ‘filed’ rather than a broader alternative like ‘made,’ if it does not connote something in writing, at least suggests a degree of formality consistent with legal action and inconsistent with employee-to-employer complaints... Third, the phrase ‘filed any complaint’ appears alongside three other protected activities. Since each of these three activities involves an interaction with governmental authority, we can fairly attribute this characteristic to the phrase ‘filed any complaint’ as well... And finally, the 1938 version of the FLSA, while creating private rights of action for other employer violations, see § 16(b), 52 Stat. 1069, did not create a private right of action for retaliation. That was added in 1977.” *Kasten v. Saint-Gobain Performance Plastics Corp*, No. 09-834 (U.S. 3/22/11)

This decision leaves the employee to prove that s/he made an oral complaint to the employer and that the employer took an adverse action “because of” the employee’s complaint.

Reminder that Exempt Employees Must be Paid on a Salary Basis

A District Court in Tennessee held that a foreman for a metals company was not

compensated on a "salary basis," thus he does not qualify as "executive employee" exempt from the FLSA overtime requirements. To be an exempt executive or administrative employee, the employee must meet not only the duties test; he must meet the salary basis test. That is, he must regularly receive a predetermined amount each pay period without deductions from his pay

when he works less than 40 hours in a workweek. The company had no written policy explaining such deductions (so the safe harbor rule did not apply), and it failed to present evidence that it did not intend the payroll department to make deductions from the foreman's salary. *Macklin v. Delta Metals Co.* 17 WH Cases2d 408 (W.D. Tenn 1/4/11)