

EMPLOYMENT BULLETIN

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U.S. Supreme Court Expands Title VII Retaliation Claims to Third Parties

On January 24, 2011, the United States Supreme Court held that the terminated fiancé of another employee who had filed a sex discrimination charge could bring his own suit under Title VII for retaliatory termination.

In *Thompson v. North American Stainless*, an employee filed suit under Title VII alleging that his employer had terminated him because his fiancé had filed a charge of sex discrimination against the same employer less than a month earlier. The question presented to the Supreme Court was whether the anti-retaliation provisions of Title VII extended to include not just the individuals who engaged in the protected activity themselves, but also other employees who had some relationship with the complaining employee.

In a unanimous decision, the Supreme Court ruled that Title VII's anti-retaliation provision extends to include "third party retaliation claims." The Court explained that the purpose of Title VII's anti-retaliation provision is to prohibit employer action that might dissuade a reasonable worker from making or supporting a discrimination charge. Moreover, the Court declined to identify a "fixed class of relationships" that fell within a "zone of interest," but did indicate that a close family member who is fired will "almost always" be able to assert a claim under Title VII while "mere acquaintances" will "almost never" be able to do so. Thus, the Court held that Thompson fell within the "zone of interest" protected by Title VII explaining that Thompson "was an employee of Northern American Stainless ("NAS"), and the purpose of Title VII is to protect employees from their employer's unlawful actions." Further, the Court found that Thompson was not an accidental victim of the retaliation. Rather, hurting Thompson was the unlawful act by which NAS punished the complaining party.

So what does this mean for employers? There are a number of steps employers can take in preventing retaliation claims. For example, employers should properly review and revise their anti-discrimination and anti-harassment policies to ensure they contain broad statements expressly prohibiting retaliation. Further, employers should clearly communicate their performance expectations to their employees in performance reviews, employee handbooks or written policies. Finally, employers should properly document their personnel actions by giving employees periodic written feedback on their performance and by documenting disciplinary actions in the employee's personnel file.

Construction Workplace Misclassification Act

On February 10, 2011, the Pennsylvania Construction Workplace Misclassification Act ("CWMA") went into effect. The Act restricts the circumstances under which a construction worker may be classified as an independent contractor for purposes of workers' compensation and unemployment compensation.

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(continued)

Under the Act, to be properly classified as an independent contractor, the construction worker must: (1) have a written contract to perform services; (2) be free from control or direction from the hiring party; and (3) be customarily engaged in an independently established trade, occupation, profession or business.

Criteria to be considered in determining what an independently established trade actually is include a determination of whether the construction worker: (1) possesses the essential tools, equipment and other assets necessary to perform the services; (2) realizes a profit or suffers a loss as a result of performing the services; (3) performs services provided through a business in which the construction worker has a proprietary interest; (4) maintains an independent business location; (5) performs similar services for others; and (6) maintains liability insurance during the term of the contract of at least \$50,000.

The Act also subjects employers, and officers or agents who intend to contract with employers, to multiple penalties for knowingly misclassifying workers and failing to provide coverage or make required payments or contributions under the Workers' Compensation Act or the Unemployment Compensation Law.

What should employers do? Affected employers should create independent contractor agreements for each worksite and project and should carefully evaluate all potential workers under these new criteria. Employer policies that define "employee" should also be amended to reflect the CWMA.

Babst, Calland, Clements and Zomnir, P.C.'s Employment and Labor Services Group and Health and Safety Group will continue to keep employers apprised of further developments related to this and other issues. If you have any questions or need assistance in addressing the above-mentioned area of concern, please contact John McCreary at (412) 394-6695 or jmccreary@bccz.com or Shefali Patel at (412) 773-8701 or spatel@bccz.com.