Labor & Employment News

Volume 07 - 04 | Fall 2006

EXPERIENCED. EFFICIENT. EFFECTIVE.

THOMPSON COE

Contents

Are the Floodgates Open? The U.S. Supreme Court's Retaliation Ruling Touted as Major Victory for Employees

On June 22, 2006, the United States Supreme Court issued its highly anticipated decision in *Burlington Northern & Santa Fe Railroad v. White*. In this decision, the Supreme Court resolved a split among the appellate courts and established a new standard for retaliation cases brought under Title VII of the Civil Rights Act of 1964. The decision is deemed by most to be a major victory for employees, and the number of retaliation cases filed that will ultimately reach a jury is expected to increase.

The Court held that the anti-retaliation provision prohibits "employer actions that would have been materially adverse to a reasonable employee or job applicant." In explaining the "materially adverse" standard, the Court stated that the employer's actions must be "harmful to the point that they would well dissuade a reasonable worker from making or supporting a charge of discrimination." The Court also noted that the scope of Title VII's anti-retaliation provision could extend beyond workplace and employment-related retaliatory acts.

The case was originally filed by Sheila White, the only female employee in Burlington Northern's maintenance department in its Memphis, Tennessee facility. Ms. White alleged that the company engaged in two acts of retaliation against her after she complained of sex discrimination. After complaining, Ms. White was reassigned to a less desirable position, although she retained her same pay and benefits. Next, she was accused of insubordination and was suspended without pay for thirty-seven days, although the company ultimately reinstated her and reimbursed her for the back pay she had lost. The jury found both acts to be retaliatory and awarded her $43,500 in damages plus her medical expenses. Burlington Northern appealed the decision all the way up to the United States Supreme Court.

In making its decision, the Supreme Court analyzed the different standards employed by the various appellate courts and the Equal Employment Opportunity Commission. The Court deemed the current standard of the Fifth Circuit, the federal appellate court for cases filed in Texas, to be too restrictive. The Fifth Circuit employed, at least up to this time, the "ultimate employment decision" standard, which limited

See *"The Ultimate Employment Decision"* on Page 2

The "Ultimate Employment Decision" (cont'd from Page 1)

retaliatory conduct to acts "such as hiring, granting leave, discharging, promoting, and compensating." The Supreme Court also rejected the standard enunciated by the Sixth Circuit, which stated that the plaintiff must show an "adverse employment action" which it defined as a "materially adverse change in the terms and conditions" of employment, thereby requiring a link between the challenged retaliatory action and the terms, conditions, or status of employment. The Court also considered the EEOC's standard, which had been adopted by the Ninth Circuit, which required a plaintiff to establish adverse treatment reasonably likely to deter the charging party or others from engaging in protected activity.

> " ...The Court determined that the provisions that prohibit discrimination are limited in scope to actions that affect employment or alter the conditions of the workplace such as 'compensation, terms, conditions, or privileges of employment.'"

The Court closely examined the wording of the provisions of Title VII that prohibit discrimination and the wording of the provision that prohibits retaliation. The anti-discrimination provisions seek to prevent injury to individuals based upon who they are, (e.g., protected class status), and the non-retaliation provision seeks to prevent harm to individuals based upon the conduct in which they engage, (e.g., making a complaint of discrimination). The Court determined that the provisions that prohibit discrimination are limited in scope to actions that affect employment or alter the conditions of the workplace such as "compensation, terms, conditions, or privileges of employment." On the other hand, the Court determined that the anti-retaliation provision has no such limitation. The Court therefore reasoned that Congress intended for there to be a difference in the standards of liability for the anti-discrimination provisions and the non-retaliation provisions.

The Court reasoned that a provision that limited acts of retaliation to employment-related actions "would not deter the many forms that effective retaliation can take" and noted that, "[A]n employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm outside the workplace." The Court did recognize, however, that "material adversity" requires significant harm as opposed to trivial harms and that slights and minor annoyances are not actionable. Whether a particular act is materially adverse depends upon the particular case and should be judged from the perspective of a reasonable employee.

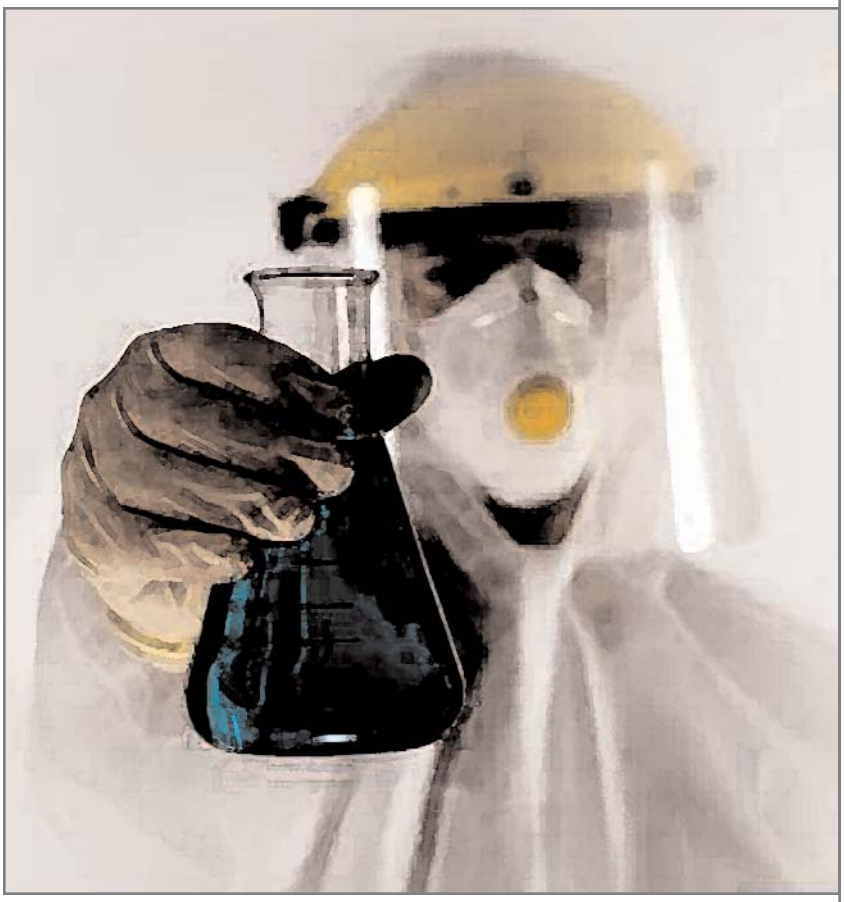
Although there were no dissenting opinions, Chief Justice Alito wrote an opinion concurring with the judgment, but disagreeing with the majority's interpretation of the retaliation provision. Justice Alito recognized that the Court's opinion grants those claiming retaliation greater rights than those whom Title VII was originally enacted to protect: victims of discrimination. Accordingly, Justice Alito proposed that a plaintiff alleging a retaliation claim should be required to show the same type of materially adverse employment action that a plaintiff claiming discrimination must show.

For the time-being, employers should continue to tread very carefully with potential claims of retaliation. For instance, assigning employees to positions with less prestigious duties or more arduous tasks, even though the employee's position already entailed those same duties, could be deemed to be retaliatory. The current ruling also reopens the issue of whether an employer who files a counterclaim against an employee could be deemed to be engaging in retaliatory conduct.

It is likely that the *Burlington* standard will be applied to other discrimination statutes having similarly worded anti-retaliation provisions. Only time will show the impact this decision will have on retaliation cases in the future.

Elizabeth Marsh
emarsh@thompsoncoe.com
512.703.5047

DOL's Advisory Memorandum On "Donning And Doffing" Specialized Gear



Our March 31, 2006 newsletter addressed a recent U.S. Supreme Court case in the wage and hour area, *IBP v. Alvarez*. This decision held that under certain circumstances employers needed to pay employees for time spent walking from changing areas to their workstations after putting on specialized protective gear required for jobs, as well as for time spent walking from their workstations to the place where the gear is removed. In May of 2006, the Department of Labor ("DOL") issued an Advisory Memorandum to its directors interpreting this decision.

This Memorandum is important because it provides additional guidance to employers that have compliance concerns after the Supreme Court's decision. For instance, the Memorandum notes that while the Court's decision did not define "donning and doffing," DOL believes the definition of donning includes the obtaining of equipment.

DOL's Memorandum is also helpful because it covers areas not addressed in the Court's decision including changing gear at home. For instance, DOL reiterated its longstanding position that, "if employees have the option and the ability to change into the required gear at home, changing into that gear is not a principal activity, even when it takes place at the plant." The option of allowing employees to change at home may allow a way for your company to minimize its potential exposure.

> " ...while the Court's decision did not define 'donning and doffing,' DOL believes the definition of donning includes the obtaining of equipment."

Another area discussed in this Memorandum concerns DOL's position about whether the donning and doffing of non-unique gear—for example, hairnets, goggles, and smocks—is compensable. DOL takes the position that the distinction between unique and non-unique gear is irrelevant and believes the focus should be whether the donning and doffing of the equipment in question is part of the employee's principal activities.

Finally, the Memorandum addresses DOL's rule concerning *de minimis* activities. *De minimis* activities are essentially insubstantial or insignificant periods of time outside scheduled working hours that may be disregarded in recording time. Generally, this rule applies to only those times where the work involved is limited to a few seconds or minutes which cannot as a practical administrative matter be precisely recorded for payroll purposes. DOL has indicated that it believes this rule only applies to the "aggregate amount of time for which an employee seeks compensation, not separately to each discrete activity."

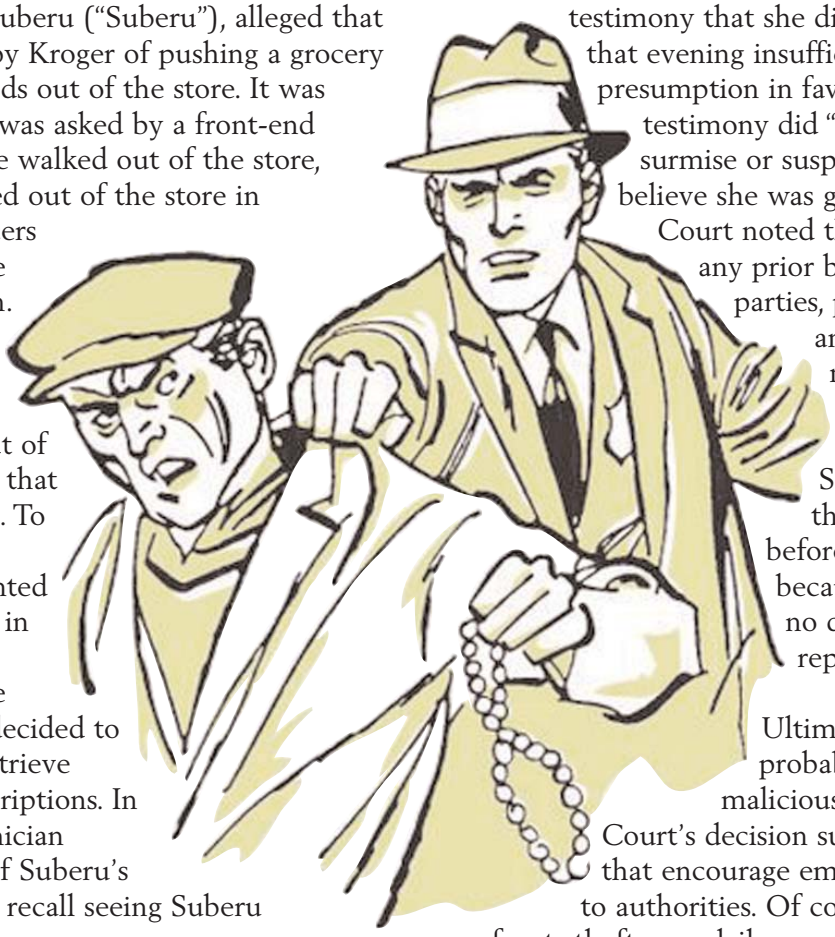
Overall, knowing DOL's stance on these various issues will help you adjust your employment practices in areas that the DOL may investigate. By following DOL's interpretations, you may be able to place yourself in a better defensive position if you are ever audited by DOL or if litigation ever arises. The full text of the Advisory Memorandum is available at www.dol.gov/esa/whd/foh/AdvisoryMemo2006_2 .htm.

Eric Hansum
ehansum@thompsoncoe.com
512.703.5076

Texas Supreme Court Strengthens Probable Cause Presumption for Employers in Malicious Prosecution Cases

All employers, and especially retail businesses that routinely deal with the theft of merchandise, should be encouraged by a recent Texas Supreme Court decision in which the Court rendered judgment that Kroger and one of its store managers (collectively referred to as "Kroger") had no liability to a customer for the store manager's decision to initiate criminal proceedings.

The customer, Theresa Suberu ("Suberu"), alleged that she was falsely accused by Kroger of pushing a grocery cart full of unsacked goods out of the store. It was undisputed that Suberu was asked by a front-end manager to "Stop!" as she walked out of the store, and she was later escorted out of the store in handcuffs by police officers called to the scene at the store manager's direction. Despite the eyewitness testimony of three store employees that Suberu pushed a grocery cart out of the store, Suberu denied that she used a shopping cart. To the contrary, Suberu claimed she only frequented the store on the evening in question to have prescriptions filled at the pharmacy and that she decided to walk to her vehicle to retrieve cash to pay for the prescriptions. In fact, the pharmacy technician backed up this portion of Suberu's testimony and could not recall seeing Suberu push a grocery cart.



Following her acquittal on misdemeanor theft charges, Suberu filed a civil suit against Kroger, claiming malicious prosecution and intentional infliction of emotional distress. Following a jury trial in which the jury awarded Suberu $79,000 in damages, the Supreme Court reversed the jury's award, finding there was no evidence to establish an essential element of malicious prosecution—that Kroger lacked probable cause at the time it reported Suberu to authorities. Additionally, the Court found there was no evidence of any extreme or outrageous conduct to support the intentional infliction of emotional distress claim.

Significantly, the Court emphasized Suberu was required to overcome a presumption that Kroger honestly and reasonably acted on the basis of its employees' observations before reporting her to the police. This presumption is only overcome by "evidence that the motives, grounds, beliefs, or other information upon which the defendant acted did not constitute probable cause." Here, the Court found Suberu's own testimony that she did not use a shopping cart that evening insufficient to overcome the presumption in favor of Kroger—Suberu's testimony did "no more than create a surmise or suspicion that Kroger did not believe she was guilty of shoplifting." The Court noted there was no evidence of any prior bad relations between the parties, preexisting debt, racial animus, or any other private motivation to harm her. Moreover, Kroger was not required to check Suberu's explanation with the pharmacy technician before contacting authorities because a private citizen has no duty to investigate before reporting a crime.

Ultimately, by reinforcing the probable cause presumption in malicious prosecution cases, the Court's decision supports company policies that encourage employees to report crimes to authorities. Of course, a business that confronts theft on a daily or weekly basis and regularly contacts authorities to report these incidents is not immune from being sued for malicious prosecution or other claims such as intentional infliction of emotional distress or defamation, when an unsuccessful prosecution follows. However, an employer is armed with a persuasive argument to defeat a plaintiff's malicious prosecution claim in all situations where the employer acted reasonably and in good faith.

Sean Urich
surich@thompsoncoe.com
214.871.8253

Can I come Along for the Ride? Piggybacking Employment Discrimination Claims

The "piggybacking" lawsuit can be one of the most dreaded and costly situations for an employer. This scenario occurs when a non-charging party tries to join in or piggyback onto a discrimination lawsuit based upon a Charge of Discrimination filed by another employee.

For example, "Joe Chargemeister" files a Charge of Discrimination on behalf of himself and other similarly situated employees. Joe eventually sues under Title VII of the Civil Rights Act. "Feisty Suemeister," a disgruntled employee, later tries to join Joe's lawsuit even though she did not file a Charge with the EEOC. Under certain circumstances, Feisty may be able to join Joe's lawsuit and maintain a Title VII cause of action without having filed a Charge with the EEOC.

A recent Court decision addressed a twist to the above scenario—whether Feisty could bring an **independent** and separate lawsuit from Joe's, but based upon his Charge. In *Price v. Choctaw Glove and Safety Company*, the Court reaffirmed the viability of the piggybacking rule in limited circumstances but did not apply this rule to **independent** lawsuits filed by a non-charging party.

As should come as no surprise, the origin of these issues began long ago. Ms. Price worked for Choctaw Glove and Safety Company and, in December of 2000, she filed a Charge of Discrimination with the EEOC. In her Charge, she asserted that the company was discriminating against women based on their sex by relegating them to lower paying positions. She filed her Charge on behalf of all present and future female employees of the company. Ms. Price obtained her right-to-sue notice and filed a class action lawsuit under Title VII. She eventually made a motion for class certification to allow additional employees to join in the lawsuit. The motion, however, was denied.

The company's victory was short lived. After the denial of the class certification, thirty-six female Plaintiffs filed a separate class action lawsuit against the same company and based upon the same facts alleged in the Price class action lawsuit. None of these thirty-six Plaintiffs filed a Charge of Discrimination with the EEOC.

At issue was whether the thirty-six female Plaintiffs needed to file a Charge with the EEOC or instead could piggyback onto the Charge filed by Ms. Price. The Court noted that there were several requirements to piggyback:

- The employee must be similarly situated to the person that filed the EEOC Charge;
- The charge must have provided some notice of the collective or class-wide nature of the charge; and
- The employee that filed the EEOC Charge must actually file a suit that the piggybacking employee may join.

While these requirements appear to have been met here, the Court noted that the piggyback rule was never meant to be used to allow a non-charging party to bring his or her own independent lawsuit based upon another party's charge. Here, the thirty-six females did not want to join the Price lawsuit and instead filed a separate lawsuit. Since the rule did not apply in this context, the thirty-six Plaintiffs failed to exhaust administrative remedies when they did not file any Charges of Discrimination with the EEOC. Consequently, their claims were dismissed.

> " ...the Court reaffirmed the viability of the piggybacking rule in limited circumstances, but did not apply this rule to independent lawsuits filed by a non-charging party."

While this case presents good news for employers in that it makes it more difficult for employees to piggyback their claims, the decision highlights the importance of proactive solutions in the workplace. As part of being proactive, make sure you have up-to-date anti-discrimination and anti-harassment policies that are not limited to just sexual discrimination and harassment. When a complaint is made by an employee, be sure to take prompt, remedial action and investigate. A good investigation can help uncover issues that were not mentioned that also need to be addressed and corrected. Finally, make sure your managers have received recent training on how to address complaints in the workplace. As the old saying goes, an ounce of prevention is worth a pound of cure and may have saved this company thousands of dollars.

Eric Hansum
ehansum@thompsoncoe.com
512.703.5076

OFCCP Issues New Standards and Self-Evaluation Guidelines for Evaluating Discriminatory Compensation Practices

The U.S. Department of Labor's Office of Federal Contract Compliance Program (OFCCP) regulates federal contractors and sub-contractors. OFCCP requires covered federal contractors to collect gender, race, and ethnicity data on applicants and employees so OFCCP can ensure nondiscrimination and affirmative action under Executive Order 11246. OFCCP recently issued Standards for Systemic Compensation Discrimination and Voluntary Guidelines for Self-Evaluation of Compensation Practices. Both issuances are effective immediately.

The new interpretative Standards are critical to the agency's compliance review process as they establish uniform standards and methodologies for evaluating contractor compensation practices. There are two major components to the Standards. First, in determining whether women and minorities are compensated the same as men and non-minorities, OFCCP will examine whether the employees are "similarly situated." This analysis will focus on similarities in job content, skills and qualifications, and responsibility levels. The second component requires a statistical analysis known as multiple regression. Systemic compensation discrimination will be found where there are statistically significant disparities between similarly situated employees, after taking into account legitimate factors affecting compensation such as education, prior work experience, performance, productivity, location, and seniority. OFCCP will only issue a Notice of Violation based on these Standards. Accordingly, employers should review their compensation practices under OFCCP's new Standards to ensure their job wage-rate decisions do not adversely affect employees in one particular gender, race or ethnic class.

In addition to the systemic compensation Standards, OFCCP also issued Voluntary Guidelines contractors can use to perform annual self-audits of their pay practices to determine if there are pay disparities based on gender, race or ethnicity. The Guidelines provide compliance incentives for contractors who adopt OFCCP's suggested methodologies as part of their self-auditing process. For example, if a contractor, in good faith, reasonably implements the evaluation methods outlined in the Guidelines, and promptly makes all necessary compensation adjustments identified during the audit, OFCCP will deem the contractor's compensation practices to be legally compliant.

The Standards for Systemic Compensation Discrimination can be viewed at <www.dol.gov/esa/regs/fedreg/notices/2006005458.htm>. The Voluntary Guidelines for Self-Evaluation of Compensation Practices can be viewed at <www.dol.gov/esa/regs/fedreg/notices/20006005457.htm>.

Sherry Travers
stravers@thompsoncoe.com
214.871.8234

September 30th Deadline: Has Your Company Filed its Annual EEO-1 Report?

The EEOC, as part of its mandate to eradicate workplace discrimination, requires public and private employers, as well as unions and labor organizations, to file periodic reports summarizing their workforce compositions by sex and by race/ethnic category. The key document used to accomplish this mandate is the EEO-1 Report, which is collected annually from private employers with 100 or more employees and federal contractors with 50 or more employees. This annual report must be filed by September 30th. State and local governments, primary and secondary school systems, institutions of higher education, Indian tribes, and tax-exempt private membership clubs are excluded from this reporting requirement.

The filing of an EEO-1 Report is required by law; it is not voluntary. The EEOC may compel a non-compliant employer to file this form by obtaining an order from a United States District Court. This is something an employer should avoid as it will result in needless legal costs and fees and almost certainly put the employer on the EEOC's radar scope for future monitoring. Further, federal contractors or subcontractors who fail to satisfy their reporting obligations are subject to contract terminations, as well as debarment from future government contracts. The EEOC's preferred method for completing the 2006 EEO-1 Survey is the EEOC's web-based filing system, which can be accessed on-line at www.eeoc.gov/eeo1survey/index.html.

Only Willful Absences or Tardiness Deductions Allowed with Fluctuating Workweek

The Department of Labor ("DOL") recently revisited the issue of whether an employer may make deductions from an employee's salary where the employer utilizes the fluctuating workweek method of compensation. Typically, employees who are not exempt from the requirements of the Fair Labor Standard Act are paid on an hourly basis. Employers are required to pay those non-exempt employees one-and-a-half times their regular rate of pay for the hours those employees work in excess of forty hours a week, and at least minimum wage.

The DOL, however, offers employers some flexibility with their non-exempt employees under the fluctuating workweek compensation plan. Employers using such a plan may pay their non-exempt employees a salary regardless of the number of hours they work each week—more or less than forty—as long as the employee receives at least minimum wage and is paid an additional half of his or her regular rate for all hours worked over forty. The regular rate is calculated on a weekly basis under this plan by dividing the employee's salary by the total number of hours worked.

> " ...An employer is permitted to take only disciplinary deductions from an employee's salary for 'willful absences or tardiness or for infractions of major work rules,' as long as the employee still earns minimum wage and his overtime compensation."

The fluctuating workweek method saves the employer money when calculating overtime. For example, consider a non-exempt employee who is paid a salary of $1,000 a week under the fluctuating workweek method. In a week where he works fifty hours, he will earn $1,100 for his time, because his regular rate is $20.00 per hour ($1,000 divided by fifty hours) and his overtime rate is calculated to be $10.00 per hour ($20.00 divided by two). However, an hourly employee paid $25.00 per hour (which would calculate out to $1,000 for a forty-hour week) will earn $1,375 in a week where he works fifty hours.

The drawback, of course, to using the fluctuating workweek method is the one outlined by the DOL in its May 16, 2006 Opinion. The fluctuating workweek regulation does not authorize regular deductions from an employee's salary for absences by that employee. The regulation instead requires the employer to pay the fixed salary "for the hours worked each workweek, whatever their number." An employer is permitted to take only disciplinary deductions from an employee's salary for "willful absences or tardiness or for infractions of major work rules," as long as the employee still earns minimum wage and his overtime compensation.

The DOL warned in its Opinion that employers should exercise much discretion in making such deductions, as frequent or consistent deductions may raise a red flag as to the validity of a fluctuating workweek plan. Following these guidelines, however, and strictly limiting the circumstances in which deductions are made, the fluctuating workweek method of compensating a non-exempt employee can be a cost-saving option for employers.

U.S. Dep't of Labor Opin. FLSA2006-15 (May 16, 2006)

Stephanie Rojo
srojo@thompsoncoe.com
713.403.8291

Seniority System Prevails Over Requested ADA Accommodation

In April 2006, the Fifth Circuit Court of Appeals – the federal appellate court covering Texas – in *Medrano v. City of San Antonio, Texas*, vindicated an employer's rights to enforce its seniority system over an employee's right to an Americans with Disabilities Act (ADA) accommodation.

The plaintiff, Christopher Medrano, worked as a part-time parking attendant at the San Antonio airport while suffering with cerebral palsy. Although he lacked seniority, Medrano was given a preferential first-shift assignment that accommodated his dependence on a special bus system. The bus system was available to San Antonio residents, with qualifying disabilities under the ADA. Medrano eventually applied for a full-time parking attendant position after the City eliminated the position of part-time parking attendant. Medrano was denied the full-time position after the interview because he requested the preferential first shift as an accommodation.

The ADA prohibits employers with fifteen or more employees from discriminating against an individual with an actual or perceived disability that substantially impairs that individual's ability to perform major life activities. Further, an employer, in certain circumstances, must provide reasonable accommodations for qualified individuals with disabilities.

Medrano's case was analyzed to determine if his request for accommodation under the ADA was reasonable when it conflicted with the employer's seniority system.

Medrano relied heavily on the U.S. Supreme Court's decision in *U.S. Airways v. Barnett*. In *U.S. Airways*, the Court held that if an employer's seniority system conflicts with an employee's request for accommodation under the ADA, the mere existence of the seniority system usually will be enough to show that the accommodation is unreasonable. However, *U.S. Airways* created an exception to this general rule that permits a court to find that "special circumstances" trump a seniority policy in certain cases.

> " ...an employee has the burden of showing 'special circumstances' that establish the reasonableness of making an exception to an employer's seniority system.."

Medrano attempted to establish "special circumstances" by arguing that his employer made the accommodation during his employment in the part-time position and thus, should make the same accommodation for the full-time position. The Court disagreed and held that the job classifications (Part-time Parking Attendant/Full-time Parking Attendant) constituted separate job classifications under the City's seniority policy.

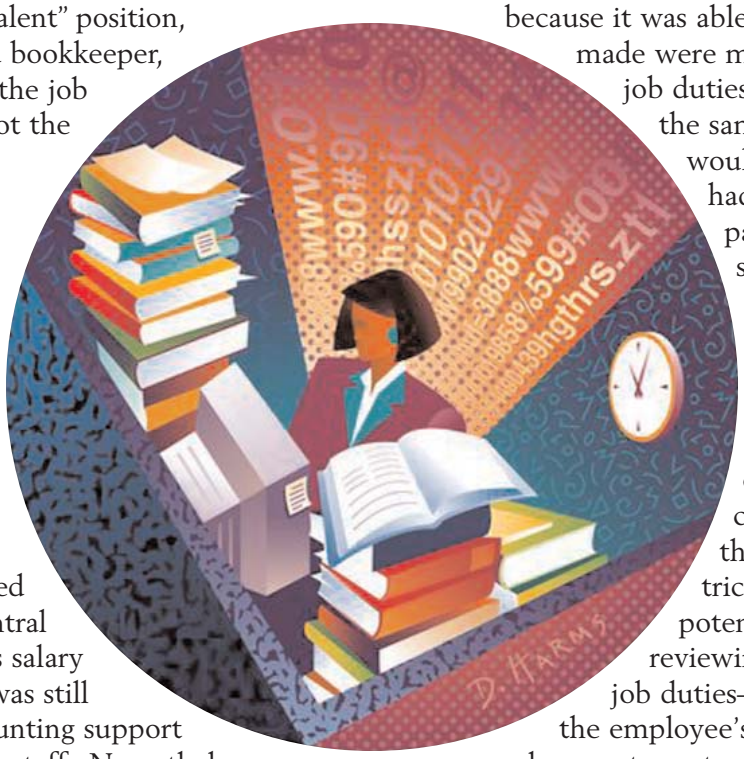
This ruling reinforces the rule that an employee has the burden of showing "special circumstances" that establish the reasonableness of making an exception to an employer's seniority system. Medrano would have prevailed if he had presented evidence that the City frequently deviated from its policy for full-time employees.

Employers must be careful not to make exceptions to their seniority policy. Employers that make frequent exceptions to their seniority policy may be required to consider making an exception for a reasonable accommodation request.

Derrick Parker
dparker@thompsoncoe.com
214.871.8231

Minor Changes to Returning Employee's Job Duties Do Not Violate FMLA

Employers wrestling with their reinstatement obligations under the Family Medical Leave Act ("FMLA") won a small, but significant victory in the recent case *Smith v. East Baton Rouge Parish School Board*. Relying on the FMLA's requirement that employers reinstate employees returning from FMLA leave to the "same" or "equivalent" position, Phyllis Smith, a school board bookkeeper, sued her employer, claiming the job to which she returned was not the same one she left.



In point of fact, Ms. Smith was correct. During her leave of absence, the school board did revise Ms. Smith's job description. Whereas she had, before her leave of absence, traveled from school to school working directly with the principals and their staff, after her return, Ms. Smith was assigned to work from the board's central office. However, Ms. Smith's salary remained the same and she was still charged with providing accounting support to school principals and their staff. Nevertheless, apparently preferring life on the road to being chained to a desk, Ms. Smith claimed the school board violated the FMLA.

The Fifth Circuit Court of Appeals, however, disagreed with Ms. Smith, holding the changes made to Ms. Smith's job duties by the school board were *de minimis*. In other words, the court decided the differences between Ms. Smith's job, before and after her leave, were insignificant. Accordingly, Ms. Smith's FMLA claim was tossed out.

While this decision is certainly good news for employers, it is important to note that the school board prevailed because it was able to show the changes it made were minor and Ms. Smith's core job duties, pay, and benefits remained the same. The employer certainly would not have fared so well if it had reduced Ms. Smith's hours, pay, or assigned her significantly different job duties.

As this case illustrates, reinstating an employee returning from FMLA leave, even when only minor changes have been made in the employee's job, can be a tricky proposition. Head off a potential lawsuit by always reviewing the returning employee's job duties—pre- and post-leave—with the employee's manager before the employee returns to work. If significant changes have been made or proposed, discuss those changes with qualified employment counsel before the employee reports for duty.

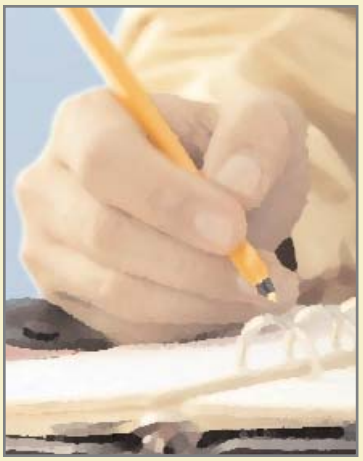
Kevin Mullen
kmullen@thompsoncoe.com
214.871.8241

Save The Date

October 5, 2006 - Dallas - Firm attorneys will conduct a one-day seminar entitled *Employee Handbooks in Texas: Everything You Need to Know to Keep You Out of Trouble.* The seminar will take place at the Crowne Plaza Dallas-Market Center, 7050 Stemmons Freeway, Dallas, Texas 75247.

November 9, 2006 - Dallas - Firm attorneys will conduct the second annual all-day *Seminar on Labor & Employment Law Developments.* The seminar will take place at the historic Arlington Hall at Lee Park, 3333 Lee Parkway, Dallas, Texas 75219.

Registration information about each of these seminars can be found on-line at www.thompsoncoe.com.



Employers Have Duty to Monitor Employees' Electronic Communications to Prevent Harm to Non-Employees

Our newsletter primarily focuses on Texas lawsuits. We recently, however, learned of a disturbing New Jersey case that may soon be making its way to Texas courthouses and thought you should know about it.

The case involved Internet misuse by an office employee. Specifically, the employee, John Doe ("Doe"), between the late 1990's and 2001, repeatedly accessed pornography sites on his company computer. The company's MIS managers confronted Doe about his access and instructed him to refrain from accessing those sites. The MIS managers did not report the incident to Doe's superiors or Human Resources. Nor did they take any other action against him.

About a year later, Doe's supervisor suspected he was again accessing pornographic web sites and asked the MIS team to investigate. Their investigation disclosed that Doe had been accessing pornographic sites, including one called "Sextracker." Management, however, took no action against Doe at that time and chastised the MIS team for snooping into Doe's personal life.

Shortly thereafter, management began receiving reports from coworkers regarding Doe's suspicious shielding of his computer screen. Doe's superiors confronted him and instructed him to refrain from further pornographic web surfing which he agreed to do.

You can probably guess what happened next. Doe, contrary to his promise, did not stop his sexual Internet surfing. Worse yet, he used his company computer to download and transmit nude pictures of his ten-year old stepdaughter to a child pornography site. Doe was shortly thereafter arrested and confessed to having downloaded some 1,000 pornographic images on his company computer during the preceding four years.

> "...This case marks the first time a court has held that employers have an affirmative legal duty to monitor electronic communications to determine if employees are engaging in illegal activity and to take immediate corrective action to stop all inappropriate activities detected."

The issue before the Court was whether employers have a duty to monitor employees' computers to determine if they are being used for illegal purposes. The Court concluded employers do have such a duty, as well as a corresponding duty to promptly investigate and correct such misconduct. The Court found that the employer violated its duty in this regard and was liable to the stepdaughter for the harm she suffered as a result of Doe's sexual victimization.

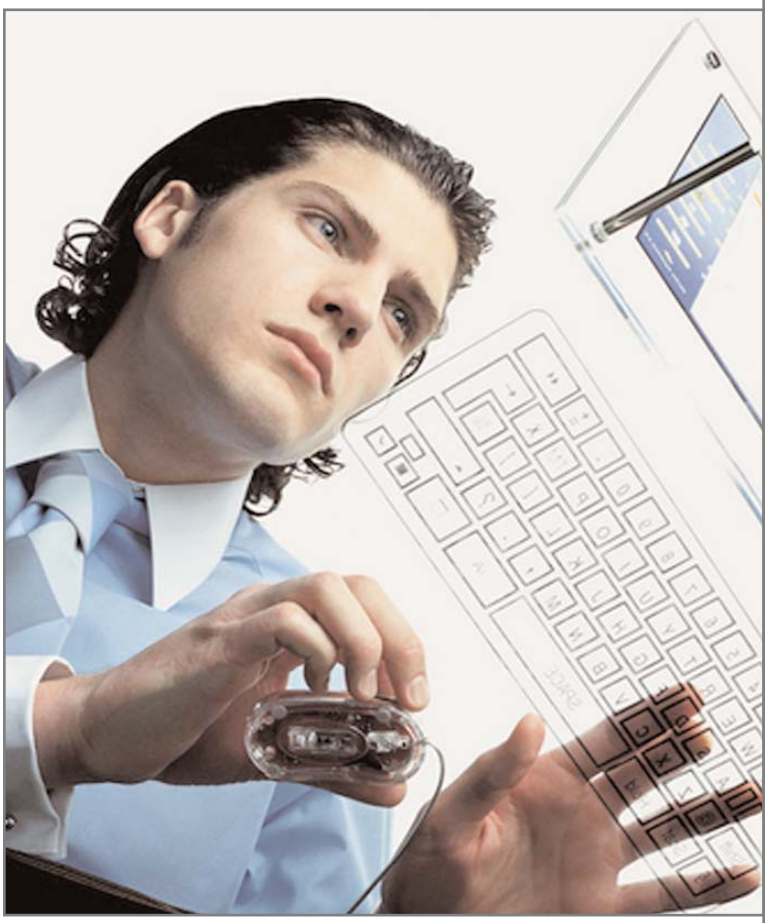
This case is unusual in that most computer-related lawsuits involve employee invasion of privacy claims and focus on an employer's right to monitor employees' electronic communications. This case marks the first time a court has held that employers have an affirmative legal duty to monitor electronic communications to determine if employees are engaging in illegal activity and to take immediate corrective action to stop all inappropriate activities detected.

The Court's ruling is analogous to those we see in state and federal discrimination and harassment lawsuits holding employers have a duty to promptly investigate known or suspected discrimination and harassment and to take prompt remedial action to correct the discriminatory or harassing behavior. This case,

however, takes these holdings a significant step further by extending this duty to non-employees outside the workplace. What the Court has really done is make a computer comparable to a company car. If an employer suspects an employee is recklessly operating a company car (i.e. the employee is driving the car while intoxicated), but takes no steps to verify that suspicion, the employer will be liable to any third party injured as a result of the employee's recklessness (i.e. intoxication).

Hopefully, this is a case of bad facts making bad law, but Texas employers should be on the lookout for copycat cases. The upshot of this decision is that employers should have solid policies in place advising employees that their computers will be monitored. Employers must also be sure to actually monitor employee communications consistent with those policies. Failure to do so could well result in liability to unknown third parties injured by an employee's electronic misdeeds.

Sherry Travers
stravers@thompsoncoe.com
214.871.8234



QuickTips

- The Worker Adjustment and Retraining Notification ("WARN") Act requires that certain employers give sixty days' advance notice to employees and local governmental officials prior to mass layoffs or plant closings. Failure to give the required notice can result in back pay liability, civil penalties and attorneys' fees. Because violations of the WARN Act inherently involve numerous employees, high back pay exposure and class action lawsuits are very serious concerns. If your company is contemplating a large reduction in force, be sure to take the WARN Act into consideration well in advance of the terminations.
- Are you experiencing high employee turnover, but are not sure exactly why it is occurring? Exit interviews are excellent tools to help uncover potential problems in the workplace that cause employees to leave. Whether it be due to pay, lack of promotional opportunities, or an unpleasant supervisor, a properly completed exit interview can help you pinpoint problems in your company and correct them so that you retain your good employees.
- When performing a workplace harassment investigation, always be sure to ask the complaining employee the relief he or she is seeking. Often, they merely state that they "want the harassment to stop." This is an important question, because it can help your company in the future if the employee files suit and asks the jury for a large amount of money.
- Retaliation claims are among the most difficult to defend and traditionally result in some of the highest jury verdicts as compared to other types of discrimination claims. If you receive a complaint of discrimination or harassment, remember that a very important step at the beginning of the process is to ensure that the complaining employee is protected from retaliatory acts by supervisors or co-workers who might be offended or insulted by the complaint.

Thompson Coe Labor & Employment Law Section

Partners

- John L. Ross :: 214.871.8206 | jross@thompsoncoe.com
  Board Certified in Labor & Employment Law and Civil Trial Law, Texas Board of Legal Specialization
- Sherry L. Travers :: 214.871.8234 | stravers@thompsoncoe.com
  Board Certified in Labor & Employment Law, Texas Board of Legal Specialization
- Elizabeth M. Marsh :: 512.703.5047 | emarsh@thompsoncoe.com
  Board Certified in Labor & Employment Law and Civil Trial Law, Texas Board of Legal Specialization
- Ryan Griffitts :: 214.871.8216 | rgriffitts@thompsoncoe.com
  Board Certified in Labor & Employment Law, Texas Board of Legal Specialization

Associates

- Eric J. Hansum :: 512.703.5076 | ehansum@thompsoncoe.com
  Board Certified in Labor & Employment Law, Texas Board of Legal Specialization
- Kevin S. Mullen :: 214.871.8241 | kmullen@thompsoncoe.com
- Sean C. Urich :: 214.871.8253 | surich@thompsoncoe.com
- Stephanie S. Rojo :: 713.403.8291 | srojo@thompsoncoe.com
- Audrey Lewis Juranek :: 713.403.8382 | ajuranek@thompsoncoe.com
- Derrick G. Parker :: 214.871.8231 | dparker@thompsoncoe.com

The Attorneys in the Labor & Employment Section of Thompson Coe counsel public and private sector management in connection with all federal, state and local laws regulating employment. Our experienced attorneys can help clients by simplifying the employment law maze, resolving sensitive employment-related issues and reducing the risk of costly lawsuits.

700 North Pearl
25th Floor
Plaza of the Americas
Dallas, TX 75201
214.871.8200 - Tel
214.871.8209 - Fax
www.thompsoncoe.com

THOMPSON COE

Austin
Dallas
Houston
Saint Paul

FIRST CLASS MAIL
U.S. POSTAGE
PAID
DALLAS, TX
PERMIT NO. 4209

How to Reach Us

If you would like more information about the issues discussed in this newsletter, or you have a suggestion for a future article, or you prefer to receive this newsletter electronically, please contact Mark Blaha at mblaha@thompsoncoe.com or 214.880.2598.

Labor & Employment News may also be found online at www.thompsoncoe.com.