

LABOR & EMPLOYMENT NEWS

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NO "R-E-S-P-E-C-T" FOR THE NLRB

In our Spring 2007 edition of the *Newsletter* (<http://thompsoncoe.com/portals/0/08-02.L.E.News.pdf>), we alerted you to a union-sponsored Congressional effort — euphemistically titled the "Employee Free Choice Act" — to eliminate NLRB-supervised, secret ballot union elections and to impose bargaining units and collective bargaining agreements on employers based solely on union signature cards signed by a majority of employees. Although that legislation has so far been narrowly blocked in the Senate, the House is now pushing forward another union-backed bill, H.R. 1644 the "Re-Employment of Skilled and Professional Employees and Construction Tradesworkers" — RESPECT act. One can imagine Aretha Franklin singing at a union rally in support of the legislation....

The RESPECT act — which cleared the House Labor Subcommittee in late September — is designed to legislatively overturn the NLRB's trio of 2006 decisions which broadened the definition of "supervisor" under the NLRA, *NLRB v. Kentucky River Community Care, Inc.*, *Oakwood Healthcare, Inc.*, and *Croft Metals, Inc.* We reported on these cases in our Winter 2007 edition of the *Newsletter* (<http://thompsoncoe.com/portals/0/len-08-01.pdf>). The legislation would narrow the definition of "supervisor" by excluding from the definition employees who "assign" work to other employees or who exercise the responsibility to "direct" other employees in their work. Additionally, even if an employee had the patently supervisory authority to "hire, transfer, suspend, lay off, recall, promote, discharge, reward, or discipline" employees, the employee would still be excluded from the definition of "supervisor" unless the employee exercised that authority "for a majority of the individual's worktime."



The full text of the bill can be accessed at: <http://thomas.loc.gov/cgi-bin/bdquery/D?d110:1644.:list/bss/d110HR.lst.:!TOM:/bss/110search.html>.

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IS TIME ON YOUR SIDE? COURTS RULE TIMING ALONE IS INSUFFICIENT TO SUPPORT RETALIATION CLAIMS

Your company finds the need to terminate an employee for a legitimate work-related reason, but this need follows uncomfortably closely on the heels of the employee's "protected activity." What is the decision? In such a case, the employer will often hesitate to terminate the employee, based on the potential retaliation claim that will likely result. However, as recently recognized by the Fifth



of "but for" causation. Such a rule would unnecessarily tie the hands of employers." 482 F.3d 802, 808 (5th Cir. 2007).

The *Strong* case addresses to what extent an employee may rely on *timing alone* to establish a link between protected activity and the employer's decision to terminate. By way of review, the elements of retaliatory discharge are (1) the employee engaged in a protected activity, (2) the employer discharged the employee, and (3) there is a causal connection between the protected activity and the discharge. Once the employee makes this preliminary showing, the employer must state a "legitimate, nondiscriminatory reason" for the plaintiff's termination.

In the *Strong* case, Laurie Strong worked for approximately two years as a nurse coordinator in the "liver department" of the University Healthcare System, L.C. ("UHS"), a large hospital in Louisiana. At a meeting attended by supervisors, Ms. Strong complained that one of the doctors discriminated against her based on her gender by calling her

"stupid and lazy," screaming at her, and becoming angry at her during a meeting.

The complaint was made on December 15, 2003. Ms. Strong was then terminated on March 31, 2004, approximately three and a half months after her initial discrimination complaint. The hospital claimed the reasons for Ms. Strong's termination were work-related performance issues.

Ms. Strong filed a retaliation claim against UHS, claiming that the reasons given for her termination were pretextual. In doing so, Ms. Strong asserted that the three-and-a-half-month time span between her complaint and termination was "solid evidence of retaliation." Ms. Strong relied on a Fifth Circuit case, *Shirley v. Chrysler First, Inc.*, 970 F.2d 39 (5th Cir. 1992). In *Shirley*, the Fifth Circuit determined the employer had retaliated against its employee when it terminated her fourteen months after she filed an EEOC complaint. However, in *Shirley*, the employee did not rely solely on the short time period between the protected activity and termination to prove retaliation. The employee was also able to demonstrate that she had not received any discipline during her nine years of employment, and she was quickly fired for reasons that were not supported by the employer's evidence. In addition, the plaintiff complained that her boss made disparaging comments about her EEOC complaint and "harassed [her] to death about it" before firing her.



In contrast, Ms. Strong's work-place behavior, before and after her discrimination complaint,

IS TIME ON YOUR SIDE? COURTS RULE TIMING ALONE IS INSUFFICIENT TO SUPPORT RETALIATION CLAIMS, CONT'D.

had been the subject of numerous complaints from patients, co-workers, supervisors and doctors. The complaints included problems with her rude behavior, not failing to perform her duties, inappropriate comments about the quality of physicians' work in the presence of new employees, patient complaints, and other acts of insubordination. After several of these incidents, Ms. Strong was "counseled" by different supervisors. Despite the reprimands, Ms. Strong continued her disruptive behavior. Finally, she misdiagnosed a patient's suitability for a liver transplant. This incident led to Ms. Strong's suspension without pay and the ultimate decision to terminate her employment. UHS cited the reasons for the suspension and termination as poor performance and improper work conduct, including redirecting patients away from certain doctors; presenting patients in a negative fashion; arguing with superiors; and engaging in behavior obstructive to various department policies.

After considering Ms. Strong's evidence, the Fifth Circuit court emphasized that litigants generally cannot rely on "temporal proximity" alone to establish retaliation, unless the timing is "very close." However, if legitimate reasons for firing an employee are stated and the employee cannot put forth sufficient evidence to show those reasons are pretextual, then the retaliation claims, such as those asserted by Ms. Strong, must fail.

Similarly, in *Norton v. City of San Antonio*, employee Debra Lynn Norton claimed her employment with City Public Service ("CPS") was terminated because she exercised her right to request FMLA leave. CPS presented evidence that the decision to terminate Ms. Norton was made several days prior to her request for FMLA leave. In addition, CPA presented several types of evidence supporting its

contention that Ms. Norton had failed to complete her work duties on several occasions. The court therefore held:

Norton emphasizes the temporal proximity of her leave request and CPS's notification of the termination; however, that *timing is not enough to overcome CPS' evidence indicating that it terminated Norton for failing to complete her filing duties.*



Indeed, Norton's summary-judgment evidence consists only of timing. She has presented no evidence that raises a fact question about whether the failure to complete her filing duties was the real reason CPS terminated her.

Norton v. City of San Antonio, No. SA-05-CV-1186, slip copy, 2007 WL 861041 (W.D. Tex. Mar. 19, 2007) (emphasis added).

. . . timing alone is insufficient to establish a causal connection between the protected activity and the discharge.

These recent cases demonstrate that, if an employee is terminated for a legitimate work-related reason shortly after the employee engages in a protected activity, the employer should argue that *timing alone is insufficient to establish a causal connection between the protected activity and the discharge.* Therefore, as an employer responding to such a claim, *time may be on your side.*

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U.S. SUPREME COURT TO CONSIDER WHAT CONSTITUTES A CHARGE OF DISCRIMINATION

On June 4, 2007, the United States Supreme Court agreed to review a Second Circuit decision, *Holowecki v. Federal Express Corp.*, which held that the submission of an intake questionnaire and affidavit to the EEOC constituted a timely charge of discrimination for purposes of the Age Discrimination in Employment Act (“ADEA”).

Under the ADEA, a claimant must file an EEOC charge at least 60 days before bringing suit for violation of the statute. In “deferral states” such as Texas and the states at issue in *Holowecki*, the claimant also must file his charge within 300 days after the alleged unlawful practice occurred or 30 days after he receives notice of the termination of an investigation by the state agency, whichever is earlier. ADEA claimants do not have to wait for a right-to-sue notice from the EEOC before suing their employer, as is the case under Title VII; but, if the EEOC does issue a right-to-sue notice, the claimant must file suit within 90 days.

In *Holowecki*, the Second Circuit was faced with fourteen ADEA claimants, three of whom filed EEOC charges against FedEx, their employer, and eleven who did not. Patricia Kennedy, one of the three who filed a charge, delayed filing it until after the 60-day time limit under the ADEA expired; however, she filed an EEOC intake questionnaire and four-page verified affidavit before the expiration of both the 60- and 300-day time limits. Former employees George Robertson and Kevin McQuillan filed EEOC charges against FedEx within the 60-day time limit, but the district court found that each of their charges failed to meet the 300-day deadline. FedEx also argued that these two claimants failed to file suit within 90 days of their receipt of right-to-sue letters. Robertson claimed that he moved and submitted a mail forwarding request to the United States Postal Service and that his right-to-sue notice did not reach him at his new address until he requested a copy of it nine months after its original issuance. The eleven other ADEA claimants who did not file charges of discrimination argued that, due to the “single filing” or “piggybacking” rule, they should be permitted to join in one of the other actions because their claims arose out of similar discriminatory treatment in the same time frame.



The Second Circuit held that Patricia Kennedy’s intake questionnaire and four-page affidavit constituted an EEOC charge — regardless of the fact that the EEOC never investigated or notified FedEx of her claims — because (1) the documents she submitted satisfied the statutory and regulatory requirements regarding the content that must be included in a charge, and (2) the documents demonstrated that Kennedy intended to activate the EEOC’s administrative process. The Court further held that the ADEA claimants who did not file their own charges of discrimination could “piggyback” onto Kennedy’s “charge,” because her affidavit identified discriminatory treatment similar to that which they claimed and the affidavit alleged that a large group of workers experienced similar discrimination. In addition, the Second Circuit found that Robertson’s and McQuillan’s charges of discrimination were not improperly filed more than 300 days after the alleged discriminatory practices occurred, because they complained about their terminations and other acts rather than about FedEx’s alleged discriminatory policies that had been in place for several years. The Court remanded on the issue of whether the lawsuit was filed within 90 days of Robertson’s and McQuillan’s receipt of the right-to-sue letters.

The Second Circuit’s approach not only creates confusion about whether a charge has been filed, but it permits claimants who did not file charges of discrimination to bring suit against their employer without the employer ever having received notice of their claims, thus eliminating the employer’s opportunity to investigate and resolve the dispute without litigation. An ADEA claimant could also delay bringing a discrimination suit for years where the EEOC has not acted on their filed intake questionnaire, and the only limitation on their ability to file suit would be if the EEOC issued a right-to-sue notice. Ultimately, the United States Supreme Court’s holding on the issue of what constitutes a “charge” could have broad implications for employers nationwide. The ruling will also most likely affect not only ADEA claims but Title VII, ADA, and Section 1981 claims as well.

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A VICTORY FOR EMPLOYEES UNDER THE FLSA: ATTORNEY'S FEES CAN BE RECOVERED EVEN WHEN THE WAGES OWED ARE NOMINAL

In a stunning development under the Fair Labor Standards Act ("FLSA"), the federal appellate court for Texas recently permitted prevailing employees to



recover over \$50,000 dollars in attorney's fees despite the fact that the overtime wages due to them totaled only approximately \$4,500 (*Lucio-Cantu v. Vela*).

In this decision, several former employees sued their employer claiming it failed to pay them overtime as required under the FLSA. The matter was tried to a jury and the jury awarded overtime wages to each of them. The amounts awarded to the three prevailing employees, however, were nominal: \$3,348.29, \$1,296.00, and \$52.50.

After these amounts were awarded, the Judge found that the company did not make the necessary showing to establish it make good faith efforts to comply with the law. Thus, the Judge awarded liquidated damages. There are no punitive damages or damages that "punish" the company under the FLSA. Instead, the amount of wages owed can be doubled as liquidated damages if the employer cannot make a showing of good faith. To add insult to injury, the Judge then awarded over \$50,000 in attorney's fees to the former employees.

Understandably, the company appealed. On appeal, the company made several arguments to challenge this decision. The company argued that one of the parties should not be entitled to receive any

attorney's fees because she was not a "prevailing party" since she only recovered \$52.50.

Unfortunately for the employer, the Court did not think the dollar amount recovered was important. Instead, the Court found that the employees had prevailed on a significant issue in their case: whether the company violated the FLSA by failing to pay them overtime. Consequently, the award of attorney's fees was upheld.

This decision is important for employers in several respects. The decision raises the stakes in FLSA cases. Even when small wage amounts are recovered at trial, if the company violated the FLSA, attorney's fees may be recoverable. Thus, complying with the FLSA is more critical than ever, even if only nominal amounts of wages are involved.

Companies also need to ensure that their wage and hour documentation is accurate and that it is retained for the appropriate period of time. Given that attorney's fees may be recovered for even small amounts of overtime owed, having the appropriate records showing the exact number of hours worked

will help employers establish that wages were paid appropriately. In this case, the company had unfortunately destroyed the employment records for the employees, making it much harder for the company to prevail.

If the wage and hour records had been retained, the results of this decision may have been different.

Lucio-Cantu v. Vela, 2007 WL 1342513 (5th Cir. May 8, 2007) (unpublished)

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...attorney's fees may be recovered for even small amounts of overtime owed...

“BUT IT HAPPENED TO ME, TOO!!!”

Some time early next year lower federal courts, employers, and employment lawyers should receive some guidance from the U. S. Supreme Court on a troubling evidentiary issue which frequently plagues discrimination litigation — the admissibility of “me too” evidence. What is “me too” evidence? It is testimony of fellow employees of the plaintiff in a discrimination case that they, too — the fellow employee(s) — were subjected to discrimination of a similar nature. For example, a plaintiff may claim that he was discharged because of his race. At trial, in order to prove discriminatory intent on the part of the employer, he may seek to offer testimony from co-workers who believe they, too, were discharged because of race, even though they are not plaintiffs in the case.

There may be a variety of similarities or dissimilarities between the circumstances under which the plaintiff and the co-worker(s) were discharged which affect the weight of such testimony, *e.g.*, How “similarly situated” is the co-worker to the plaintiff? Did the same supervisor make the discharge decision for both plaintiff and the co-worker? Were the reasons given for the terminations similar? How close or remote in time were the decisions made? Did the plaintiff and the co-worker work at the same facility or in similar jobs? Were the decisions made as part of or as a result of a company policy or practice, such as a reduction-in-force? How strong is the testimony of the co-worker, *i.e.*, does he merely have a *subjective* belief he was the victim of discrimination, or is there other anecdotal evidence to support his testimony, such as racist comments made by the decision-making supervisor?

The existence and admissibility of such evidence can greatly complicate trial of a case for the employer and can significantly affect the settlement value or verdict exposure in the case. If such evidence is admitted, the employer is essentially faced with having several “mini-trials” within the main trial of the plaintiff’s lawsuit. That is, the employer will need to not only defend its decision to discharge the plaintiff but will also have to present evidence justifying its decision to discharge the co-worker(s). Additionally, even where there are few, if any, similarities between

the circumstances of the plaintiff’s discharge and the discharge of the co-worker(s), the jury may believe “where there’s smoke, there’s fire.” Finally, if the jury believes the employer has a pattern or practice of discriminating against a class of employees, the jury may be more inclined to impose significant punitive damages. On the other hand, where there are close similarities between the circumstances of the discharges of the plaintiff and the co-worker(s), “me too” evidence can be compelling, probative evidence for the plaintiff. Such evidentiary rulings are customarily within the trial court’s broad discretion; but, the courts have not been consistent in adopting or applying standards by which that discretion should be exercised regarding “me too” evidence.

The Supreme Court has, however, granted review in a “me too” evidence case which should help resolve some of these issues. In *Sprint/United Management v. Mendelsohn*, the plaintiff sued Sprint, claiming her discharge as part of “an ongoing, company-wide” reduction-in-force was based on her age, 51. At trial, she sought to introduce testimony from five other older employees who had been released as part of the same RIF. The district court excluded the testimony, because (1) the plaintiff failed to demonstrate the decision to select the other employees for the RIF was made by the same decision-maker who had selected the plaintiff and (2) lack of temporal proximity of the discharges. However, the court allowed Mendelsohn to present statistical evidence concerning the persons selected for the RIF as well as evidence concerning the criteria for selection and the degree to which Sprint failed to uniformly apply those criteria. The court explained its ruling to exclude the *testimony* of the



‘I was RIF’d, it was because of my age’

“BUT IT HAPPENED TO ME, TOO!!!” CONT’D

other employees by saying it was only the court’s intent “to prohibit other employees from coming in and saying ‘I was RIF’d, it was because of my age’ and that sort of thing.” The jury returned a verdict for the employer.

The Tenth Circuit Court of Appeals reversed and directed the plaintiff receive a new trial. A majority of the appellate court concluded that, although the other employees were not selected for discharge by Mendelsohn’s supervisor, the evidence of the other employees was, nevertheless, admissible, because the other employees had each been released within a year of each other as part of an ongoing, company-wide RIF and had been selected based on similar criteria. The majority’s decision was also affected by the fact the district court had allowed Sprint to argue it had *retained* other, older workers, even though those other workers did not have the same supervisor as plaintiff;

so, plaintiff should have been given the opportunity to present evidence Sprint had also *discharged* other older workers, even though they had different supervisors.

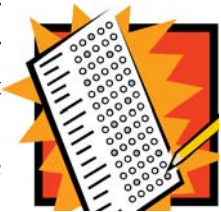

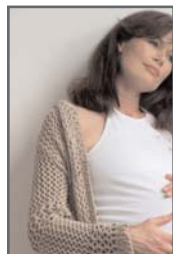
The Supreme Court granted *certiorari* on the following issue:

Whether a district must admit “me, too” evidence — testimony, by non-parties, alleging discrimination at the hands of persons who played no role in the adverse employment decision challenged by the plaintiff.

Oral argument before the Supreme Court was held on December 3. We will keep you posted.

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QUICK TIPS

- Utilize a fun learning tool that can help your executives, managers, supervisors and other employees identify hidden biases before the biases affect employment actions and your organization. The Implicit Association Tests (“IAT”) are private and confidential tests that help identify specific preferences that people may be unwilling or unable to acknowledge. Go to <https://implicit.harvard.edu/implicit/> and try the following: Race IAT, Skin-Tone IAT, Age IAT, and/or Sex-Career IAT. 
- Decisions regarding whether to grant leave under the Family Medical Leave Act (“FMLA”) to an employee to care for a family member should be assessed objectively. If an employee requests leave under the FMLA to care for a family member; the company is entitled to know from the employee “the care he or she will provide and an estimate of the time period.” Also, at their discretion, employers may condition the protected leave on the timely return of the certification form from a health care provider, whether the employees’ leave is for a family member’s health problems or his/her own. 
- Due to the rise of pregnancy-discrimination filings with the Equal Employment Opportunity Commission (“EEOC”) in the past 10 years, the EEOC has issued new guidelines on job bias against working parents. The EEOC’s examples of improper behavior include: (1) decisions based on stereotypes, *e.g., statements that a woman’s job performance deteriorates after the birth of a child*; (2) decisions based on assumptions, *e.g., mothers are not interested in new jobs that require longer hours*; and (3) discrimination against fathers, *e.g., the belief that fathers do not need parental leave*. 

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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.

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