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LABOR & EMPLOYMENT LAW ALERT

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U.S. Supreme Court Holds That Employee Fired After Fiancée Filed EEOC Charge May Sue Under Title VII

Reversing the Sixth Circuit Court of Appeals, the U.S. Supreme Court held that an employee who was allegedly fired because his fiancée filed an EEOC charge against their employer had standing to file a Title VII retaliation lawsuit. *Thompson v. North American Stainless, LP*, Docket No. 9-291 (January 24, 2011). Justice Scalia, in a unanimous decision, held that Title VII permitted a third-party retaliation suit, using the "zone of interests" test to determine that the employee was a person aggrieved with standing to sue.

In *Thompson*, both the employee and his fiancée worked for the same employer when she filed an EEOC charge alleging sex discrimination. Shortly thereafter, the employee was terminated for poor performance. He then filed an EEOC charge claiming he was fired in retaliation for her EEOC charge and then filed a retaliation lawsuit. The district court dismissed the complaint, finding that Title VII did not permit third-party retaliation suits. The Sixth Circuit affirmed, holding that because the employee did not engage in any statutorily protected activity for himself or on behalf of his fiancée, he was not included in the class of persons for whom Congress created a retaliation cause of action.

The Supreme Court reversed. It easily found that the alleged facts, if true, would constitute unlawful retaliation under Title VII. Simply put, if the employer fired the employee because his fiancée filed an EEOC charge, that was unlawful retaliation. The Court found it "obvious that a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiancée would be fired." The Court, however, declined to identify a fixed class of relationships for which third-party reprisals are unlawful, writing that "We expect that firing a close family member will almost always meet the *Burlington* standard, and inflicting a milder reprisal on a mere acquaintance will almost never do so, but beyond that we are reluctant to generalize.".

The Court then went on to hold that Title VII granted the aggrieved employee a cause of action. Title VII provides that "a civil action may be brought . . . by the person claiming to be aggrieved." But what exactly does the term "aggrieved" person mean? The Court, relying on the meaning ascribed to the term in *Trafficante v. Metropolitan Life Inc Co.*, 409 U. S. 205 (1972) and the Administrative Procedure Act, found standing for plaintiffs who fall "within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint.'" The "zone of interests" test denies a right of review "if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." The Court held that the term "aggrieved" in Title VII incorporates this test, enabling suit by any plaintiff with an interest "arguably [sought] to be protected by the statutes," while excluding plaintiffs who might technically be injured in an Article III sense but whose interests are unrelated to the statutory prohibitions in Title VII. Applying this test, the employee fell within the zone of interests protected by Title VII. He was an employee of the employer, and the purpose of Title VII is to protect employees from their employers' unlawful actions. Justice Scalia pointedly observed that the plaintiff "was not an accidental victim of the retaliation—collateral damage, so to speak, of the employer's unlawful act. To the contrary, injuring him was the employer's intended means of harming" the fiancée.

The Bottom Line. The Court's expansion of the term "aggrieved person" is by no means a surprise and has simply arrived at a decision already reached by numerous state courts who have already determined that associational retaliation is unlawful. The case is an excellent reminder that all adverse employment actions must be carefully considered to ensure compliance with the law. Supervisors must be trained to know what they can and cannot do. Policies should be reviewed and if necessary updated. Please let us know if we can be of help.

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A Pilgrimage Of Healing Is Not An FMLA Covered Event

The FMLA entitles employees to twelve workweeks leave annually to care for certain family members, including a spouse if the spouse has a serious health condition. 29 U.S.C. § 2612(a)(1)(C). A "serious health condition" is "an illness, injury, impairment, or physical or mental condition that involves . . . inpatient care in a hospital, hospice, or residential medical care facility; or . . . continuing treatment by a health care provider." Id. § 2611(11). But did the FMLA cover an employee's seven-week trip to the Philippines with her husband who suffered from a serious health condition so that he could participate in a faith healing event at a Catholic "Pilgrimage of Healing" ministry? The First Circuit Court of Appeals, in *Tayag v. Lahey Clinic Hosp.*, Docket No. 10-1169 (1st Cir. January 27, 2011), answered that it does not, holding that a "Catholic Healing Ministry" did qualify as a "health care provider" which the statute defines as "a doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices; or . . . any other person determined by the Secretary to be capable of providing health care services." 29 U.S.C. § 2611(6). The Court acknowledged that while the definition of care can include "psychological comfort and reassurance," 29 C.F.R. § 825.116, it does not extend to accompaniment of an ill spouse on lengthy trips unrelated to medical care.

The Court also rejected plaintiff's constitutional argument, the thrust of which was that FMLA discriminated against Catholics because regulations recognized "Christian Science practitioners" as "health care providers." 29 C.F.R. 825.125. The Court observed that Christian Scientists reject ordinary medical care and so, for a Christian Scientist patient, there is no alternative care provider for purposes of FMLA leave. In contrast, the employee's husband regularly received conventional medical care; the employee did not claim that her husband's religion forbids ordinary medical care, and indeed, the employee had taken full advantage of the FMLA to provide assistance to him in connection with that care.

The Bottom Line. FMLA requirements can often seem complicated but it is vital that employers fully understand their rights as well as their obligations. Before making any decision on a request for leave, get all the facts you can from the employee as well as a completed FMLA certification. Employees are not covered by the FMLA just because the request involves someone who is sick. They must establish coverage. Employers should educate their supervisors to make the right FMLA decisions. When in doubt, call labor counsel.

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Buyer Beware - Asset Purchaser May Be Liable For Predecessor's Delinquent Pension Contributions

A recent Third Circuit opinion holding that an asset purchaser of a business was liable for the delinquent benefit contributions of the seller to a multi-employer benefit fund demonstrates just how important due diligence and proper labor planning is when deciding to buy or sell an on-going business. In that case, the Court held that the purchaser of assets of a company may be liable for delinquent employee benefit contributions under ERISA as a successor in interest to the seller of those assets where the buyer had notice of the liability prior to the sale and there exists sufficient continuity of operations between the buyer and the seller. *Einhorn v. M.L.Ruberton Construction Co.*, Docket No. 09-4202 (3rd. Cir. January 21, 2011).

In *Einhorn*, a unionized employer facing severe financial hardships agreed to sell its assets to a competing construction company. The seller agreed with the union to pay all its delinquent contributions and the buyer entered into its own labor agreement with the union. As part of the transaction, a real estate holding company related to the buyer, leased the seller's New Jersey facility. Under the lease agreement another entity related to the buyer thereafter exercised its option to purchase the facility from the seller and leased the facility to the buyer. The buyer hired more than half of the seller's former employees in the months following the sale, including its Vice President and thirty-three percent shareholder, and took over several of the seller's projects. Approximately two months after the sale, the buyer auctioned off many of the assets it had purchased from the seller that were not used in the expanded operations. Shortly after the transaction the seller went out of business and stopped paying its contributions to the pension fund. The Funds then sued the buyer, seeking to

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hold it liable for the buyer's delinquent pension contributions.

The district court dismissed, finding that the buyer was not a continuation of the seller. It followed the general common law rule that an entity that purchases the assets of another does not assume the seller's liabilities unless one of the following exceptions applies: the purchaser expressly or impliedly assumed liability; the transaction amounted to a de facto merger; the purchasing corporation is a mere continuation of the seller; or the transfer of assets was for the fraudulent purpose of escaping liability for unpaid debts. Because the district court found that none of these exceptions permitting liability applied, it granted the buyer's motion for summary judgment.

The Third Circuit reversed, finding that the buyer could be liable for the delinquent contributions under a theory of successorship liability commonly used to determine liability in labor and employment cases. Guided by *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973) and the Seventh Circuit Court of Appeal's decision in *Upholsterers' International Union Pension Fund v. Artistic Furniture of Pontiac*, 920 F.2d 1323 (7th Cir. 1990), the Court held that a successor purchaser of assets may be liable for the seller's delinquent ERISA fund contributions to vindicate important federal statutory policy where the buyer had notice of the liability prior to the sale and there was sufficient evidence of "continuity of operations" between the entities. Under the substantial continuity test courts look to, inter alia, the following factors: continuity of the workforce, management, equipment and location; completion of work orders begun by the predecessor; and constancy of customers. See *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 43 (1987). This analysis differs from the traditional common law de facto merger and mere continuation exceptions because commonality of ownership is not required. See *Berg Chilling Sys., Inc. v. Hull Corp.*, 435 F.3d 455, 467-69 (3d Cir. 2006).

The Court justified its holding by observing that Congress adopted a policy of protecting ERISA funds against delinquent contributions to a degree that is greater than that afforded by the common law of contracts, concluded the appeals court. The seller's failure to pay contributions caused harm to plan beneficiaries and changed the nature of the employment relationship. Absent imposition of successor liability on the buyer, other employers would be forced to make up the difference to ensure that workers receive the benefits to which they are entitled. The Court did not find the buyer liable. Rather, the case was remanded to the district court to apply the *Golden State* successorship doctrine to determine whether the buyer was liable for the seller's delinquent contributions to the funds.

The Bottom Line. The potential for successorship liability exists in almost every type of labor and employment case. Therefore, buyers must exercise due diligence with extreme care. This is true in all cases, but especially in those where the seller has obligations to multi-employer pension funds implicating not only the possibility of delinquent contributions but the risk of multimillion dollar withdrawal liability. Buyers must develop a labor strategy *before* buying the assets so as to avoid a finding of "operations continuity." That means deciding, for example, whether or not to hire the seller's employees and managers or take over existing projects. Buyers must also find ways to insulate themselves from liability during contract negotiations. All this requires guidance from experienced labor counsel. Please call us if you would like to discuss this further.

Bressler Updates:

Michael T. Hensley Becomes a Member of the Firm

Michael T. Hensley has made important contributions to the Firm and the Labor and Employment Practice Group as an associate. We are proud to announce that he is now a Member of the Firm. Michael is a highly skilled lawyer and litigator with highly diversified experience in several areas of the law, including labor and employment. You can reach Michael by phone at 973.660.4473 or by email at mhensley@bressler.com.

Andrée Peart Laney joins the Firm and the Labor and Employment Practice Group as Counsel

We are pleased to announce that on January 31, 2011, Andrée Peart Laney joined the Firm and the Labor and Employment Practice Group as Counsel. She will continue representing employers on a wide range of labor and employment issues, including discrimination and whistleblower complaints, wage and hour claims, class and collective actions, noncompetition and trade secret protection, U5 defamation claims, FINRA arbitrations, terminations and reductions-in-force, family and medical leaves, disability accommodations, regulatory compliance, post-merger integrations, corporate handbooks, investigations, and training. Prior to joining us, Andrée was an Associate General Counsel at UBS Financial Services, Inc., a Senior Trial Attorney and an Administrative Judge for the Equal Employment Opportunity Commission, and in private practice. You can reach Andrée by phone at 973.514.1200, ext. 2239 or by email at alaney@bressler.com.

For more information about any of the topics covered in this issue of the Labor and Employment Law Alert, please contact:

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