Mitchell & Sheahan, P.C.

Experience, Integrity, Responsiveness and Commitment

NEWSLETTER APRIL 2011

In This Issue -

Greetings!

Our April Fool's joke? This is your February, March and April, 2011 issue of Mitchell and Sheahan's monthly newsletter. We don't think it's very funny either. Our New Year's Resolution to be regular and prompt with these has had the usual fate of such things. (On the other hand, Bob's lost a lot of weight!) We've given up announcing our schedule. Please stay tuned.

Our first article this month was written by Attorney Bob Mitchell and is titled, *The "Cat's Paw" Case and Why You Should Care*.

Our second article was written by Attorney Peg Sheahan and is titled, *Independent Contractor Development*.

As a third article, we have re-printed a note published by one of our close friends, Robin Imbrogno- Greenfield, owner of Human Resources Consulting Group, an H.R. outsourcing, consulting and payroll administration firm located in Seymour, CT. Her points are well-taken and reflect not only hers, but our own recent experiences.

As always, we hope you find the following articles helpful and informative. If you have any questions about the articles below or have suggestions for future articles, please feel free to contact us.

News From Mitchell & Sheahan, P.C.

Peg Sheahan has been selected as the United States Small Business Administration's 2011 Connecticut's Women in Business Champion of the Year.

Look For Bob's May Webinar on "Onboarding Basics" on CBIA

Listen to Attorney Sheahan's Comments on Managing Workplace Romance on CBIA or on Business Minutes on Local Radio Spots

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The "CAT'S PAW" Case and Why You Should Care

Bob Mitchell

The term "cat's paw" was originally given to us by Aesop, the Greek philosopher and storyteller. In the story a monkey cheats a cat by flattering it into drawing chestnuts out of a burning fire. The cat burns his paws, while the monkey makes off with the chestnuts. Federal appellate Judge, Richard Posner, introduced the term into discrimination law. See Shager v. Up-john Co., 913 398 405 (7th Cir. 1990). In employment cases, the term refers to a situation where an employer is held liable for the discriminatory animus of a supervisor who was not, himself, charged with making an ultimate employment decision later challenged under Title VII or another anti-discrimination statute. See Staub v. Proctor Hospital, __ U.S. ___, 131 S. Ct. 1186, 1190 (2011). The doctrine has been controversial ever since. On March 1, 2011, the Supreme Court issued what it likely intended to be a definitive statement about the issue in Staub v. Proctor Hospital, supra. Unfortunately, as is so often the case, the ruling leaves a number of difficult questions that will have to be resolved by the lower courts.

The Plaintiff, Vincent Staub, was employed as a technician by Proctor Hospital. He was discharged by the Hospital and sued claiming that the termination had resulted from his membership in the U.S. Army Reserve; a violation of the Uniformed Services Employment and Reemployment Rights Act (USERRA). Staub charged that his immediate supervisor as well as that manager's boss were hostile to his reserve membership because they did not like his being away for training duty. He further claimed that their hostility had led his supervisor to insert a phony Corrective Action into his disciplinary file. Within just a few months of the questioned Corrective Action notice being put into his file, Staub was fired at least in part for violating its terms. He was terminated by the Hospital's Vice President of H.R., who was not accused of any anti-military bias. Staub's suit did not charge that the H.R. VP harbored or acted out of any personal anti-military bias, but only that his own direct supervisor's, and in turn, her boss's, bias had influenced and tainted the Hospital's decision making process, even though they had played no direct role in the discharge decision. The supervisors' bias had infected the firing and so, Staub argued, the employing Hospital should be held liable to him for USERRA-prohibited discrimination.

The Court's theoretical dilemma was whether the non-

decision-making supervisors' bias could be viewed as a "motivating factor" in the Hospital's ultimate decision to fire Staub. The Court held that because their biased report was reviewed and considered by the ultimate decision maker in deciding whether to terminate Staub, the earlier supervisors' bias in inserting the Corrective Action into his file infected the discharge decision and could be imputed to the Hospital. The Hospital could be held liable for violating USERRA when Staub was fired. It is almost certain that the principles defined in this decision will be applied to other areas of state and federal employment discrimination law.

To the average employer this decision means that whenever an adverse employment action is being considered, particularly if it is based on the totality of an employee's employment record, each relevant piece of that record has to be examined to see if it was infected by arguable discriminatory bias. If it was, it should be excluded from the decision-making process. A record of prior misconduct by itself will not be enough in the future to insulate a capstone adverse employment act from criticism and the employer from potential liability.

RETALIATION COMPLAINTS FROM A NEW DIRECTION

Margaret M. Sheahan

The United States Supreme Court significantly changed the terrain of employment law with its January 24, 2011 decision in Thompson v. North American Stainless, LP, 131 S. Ct. 863 (2011). This decision identified a whole new category of potential retaliation plaintiffs, namely, co-employees who have close relationships with discrimination complainants. The scope of the expansion is potentially huge, although it will likely take many years of further development through litigation to understand what limits will actually be recognized. What we know right now is that assessing the litigation risk of any employment action just got harder and more complicated.

The plaintiff in the Thompson case was a male employee whose fiancée worked for the same company. Two weeks after the company received notice that Thompson's fiancée had filed a Title VII sex discrimination charge with the EEOC, Thompson got fired. He filed his own charge alleging that his discharge was retaliation for his fiancee's assertion of Title VII rights. His case was dismissed by the district court on a finding that Title VII does not authorize third party retaliation claims. The Sixth Circuit Court of Appeals initially disagreed, but in an en banc rehearing, the full Court determined that because Thompson had engaged in no protected activity at all, he could not assert a retaliation claim. On to the United States Supreme Court the case went.

Justice Antonin Scalia wrote the majority opinion (unanimous but for Justice Elena Kagan, who recused herself). He identified two questions in the matter: was the action against Thompson retaliation? and if so could Thompson bring suit to remedy it?

The procedural posture of the case required the Court to assume the facts were entirely as Plaintiff had asserted them, that is, that the employer discharged him in order to punish his fiancée for filing her sex discrimination charge. On that basis, Justice Scalia found it had to be considered retaliation. Recalling the 2006 decision in Burlington N. & S.F. R. Co. v. White, 548 U.S. 53, Justice Scalia noted that retaliation is not confined to employment actions but can be any action that would tend to discourage a reasonable employee population from bringing discrimination complaints. Knowing that making a complaint means getting your fiancé fired would likely dissuade someone from taking the action. The employer argued against this conclusion, noting that employers would not be able to act comfortably against any employee who had a connection to a complainant. The Supreme Court recognized the uncertainty that this ruling would cause but essentially told the employer community to live with it. The determination would have to be made on a case by case basis with a view to the particular circumstances of each case. Severe action against a close family member would very likely qualify; mild action against a less close acquaintance would likely not qualify. Beyond that the Court declined to comment. I foresee a great deal of lower court briefing and argument in our future!

The remaining question was whether Thompson had standing to assert the retaliation violation. To determine the answer, the Court looked to the meaning of "person aggrieved" in the language of the statute identifying those authorized to bring suit to enforce Title VII. Thompson argued the term is as broad as Article III of the Constitution

which has been found to permit suit by any person who can show any negative consequence to himself of the challenged conduct. The Court found this far too broad. On the other hand, the employer argued that the person aggrieved could only be the person who had engaged in the protected activity supposedly punished by the challenged action. The Court found this far too narrow. Looking for the happy medium, the Court adopted the reasoning generally applied under the Administrative Procedures Act, permitting claims to be brought by a person adversely affected or aggrieved within the meaning of a relevant statute. The Court noted its decisions holding that this permits suits by persons injured who are within the zone of interests sought to be protected by the statute allegedly violated. In the case at issue, Thompson qualified because he was an employee of the allegedly offending employer, and Title VII seeks to protect employees from employer's violations, and because the injury he asserts was not accidental or coincidental but deliberate and indeed the unlawful act itself.

Justices Ginsburg and Breyer joined in a concurrence designed solely to point out that the EEOC Compliance Manual embraces the result and deserves deference and that NLRA "third party" retaliation decisions are similarly in accord.

Now it's up to employers to consider whether a worker slated for adverse action has a relationship with any co-employee who has asserted discrimination claims and whether that relationship is sufficiently close to make the adverse action suspect as retaliation. The moral of the story in this writer's view is that employers must be prepared to articulate and support a legitimate non-discriminatory reason for every employment action. Period.

INDEPENDENT CONTRACTOR DEVELOPMENT

Robin Imbrogno-Greenfield -

Human Resources Consulting Group

"I would like to share with you a recent trend of worker misclassification that has resulted in Department of Labor Audits.

These audits (or the increase and greater scope of these audits) are a direct result of a Federal initiative to support the Health Care Reform Act and ensure that employees will not be denied benefits under the Act as a result of improper classification (non-employees or 1099's are not covered by the HCRA). Additionally, the Federal initiative has resulted in a number of "Joint Task Forces" with many different State DOL units. This initiative, coupled with a drop in unemployment funding (smaller payrolls), an increase in unemployment benefits and an increase in unemployment beneficiaries has set the stage for this recent trend.

We have had 5 clients (in the past six months) - with former Independent Contractors (IC or 1099's) who have undergone audits. Most of these audits stated with an IC filing for unemployment benefits and the State determining that no unemployment benefits had been paid by the former employer. In most of these situations, the State is directly asking the candidate whether or not he/she has been paid as an independent contractor by an organization. (Meaning you may have been a part time or secondary employer, not the full-time employer).

The results of the audits have spanned the gamut from a simple low cost outcome - a letter for demand to pay

unemployment benefits for that employee in a specific amount - to a complete audit covering the past three years and the requirement to reclassify income as W-2 (resulting in amendments to Quarterly Taxes, Annual Tax Filings, W-2's, Employee Tax Returns (penalties for not withholding income tax) and FICA charges (Employers paying both "sides" of the tax). Additionally, some of these audits have only reviewed the position or classification of the single employee filing for benefits - however, yesterday, we had a request from the DOL for ALL 1099's in 2009 (and in this case the employer has over 100).

The bottom line is to ensure that you have properly classified your 1099's or Independent Contractors. Unfortunately there is no "simple" test - and the state and federal government use different tests and different standards. In some cases, it is easy to determine that someone is misclassified as they do not have "direct control" of their product or service and they do not have "the ability to make or lose profit." However, the testing or review is more complex and may require an attorney to review the specifics and determine what case law supports your determination. There is no "list" of approved IC's." Robin's note should be viewed as a clarion call to employers who rely on independent contractors for any part of their work to review those relationships and make certain that they conform to Connecticut DOL, Federal; DOL and IRS rules.

Connecticut's DOL, for example looks at an "ABC Test" for determining if a worker is an employee rather than an independent contractor for unemployment compensation tax payment responsibility purposes. The employer bears the burden of showing that the worker is free from direction and control in performance of the service; his or her service is performed either outside of the usual course of business or outside of the employer's place of business; and that the worker is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that being performed for the employer under investigation. The IRS looks at over 20 different aspects of the relationship to decide if a worker is an independent contractor or an employee. Federal and State DOL have yet other tests when the question is an employer's obligations under the wage and hour laws and, as Robin notes, the penalties for running afoul of these rules can be severe.

Thank you for reading!

Sincerely,

Mitchell & Sheahan, P.C.

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