Proceedings

A monthly newsletter from McGraw-Hill

March 2011 Volume 2, Issue 8

The McGraw-Hill Companies

Contents

Hot Topics 2

Video Suggestions 14

Ethical Dilemma 17

Teaching Tips 19

Chapter Key 21

Dear Professor,

Here's hoping Spring Semester 2011 is progressing nicely! Welcome to McGraw-Hill's March 2011 issue of Proceedings, a newsletter designed specifically with you, the Business Law educator, in mind. Volume 2, Issue 8 of Proceedings incorporates "hot topics" in business law, video suggestions, an ethical dilemma, teaching tips, and a "chapter key" cross-referencing the March 2011 newsletter topics with the various McGraw-Hill business law textbooks.

You will find a wide range of topics/issues in this publication, including:

1. New federal regulations making it illegal for employers to discriminate against workers or job applicants based on their genetic information;

2. United States Congressional Representative Dennis Kucinich's personal injury lawsuit regarding an olive pit in a sandwich;

3. The current "state of affairs" in the United States regarding application and use of The Family and Medical Leave Act (FMLA);

4. Videos related to a) an employee fired for wearing a Green Bay Packers tie; and b) a $7.2 billion settlement related to the Bernard Madoff Ponzi scheme;

5. An "Ethical Dilemma" related to the scope and coverage of the "anti-retaliation" provisions of Title VII of the 1964 Civil Rights Act; and

6. "Teaching tips" related to Article 3 ("U.S. Lags Behind in Offering Family Medical Leave") and Video 2 ("Settlement Recovers $7.2 Billion for Madoff Victims") of the newsletter.

Spring is near…Hang in there!

Jeffrey D. Penley, J.D.
Catawba Valley Community College
Hickory, North Carolina

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March 2011 Volume 2, Issue 8

Of Special Interest

This section of the newsletter covers three (3) topics:

1) New federal regulations making it illegal for employers to discriminate against workers or job applicants based on their genetic information;

2) United States Congressional Representative Dennis Kucinich's personal injury lawsuit regarding an olive pit in a sandwich; and

3) The current "state of affairs" in the United States regarding application and use of The Family and Medical Leave Act (FMLA).

Hot Topics in Business Law

Article 1: "New Law Prohibits Genetic Screening for Jobs"

http://www.msnbc.msn.com/id/41041268/ns/health-health_care/

Federal regulations making it illegal for employers to discriminate against workers or job applicants based on their genetic information became effective recently.

The rules should be familiar to Oregon employers — the state has prohibited use of genetic screening in employment since the mid-1990s, according to state records.

Still the U.S. Equal Employment Opportunity Commission created more detailed regulations for the federal law, said Melinda Grier, who teaches employment law at the University of Oregon School of Law.

"I think it's an additional protection," she said.

As part of the Genetic Information Nondiscrimination Act of 2008, employers also cannot request, require or purchase genetic information, and the law strictly limits its disclosure, according to the Oregon Bureau of Labor and Industries and the EEOC.

Congress passed the legislation, which also deals with potential discrimination in health insurance coverage, in 2008. The EEOC adopted rules for the employment portion in November, and they became effective recently.

Genetic research has advanced quickly over the past 20 years. Scientists mapped out the human genome, which equals all the genes that make up humans, in 2003.

The advances, which prompted the law, make it possible for people to learn their potential to develop certain medical conditions based on their family histories, according to a recent BOLI technical assistance column.

Treatment for some conditions can be costly, so concerns cropped up about the potential misuse of genetic information by insurance companies and employers, many of which pay for their employees' health insurance, Grier said.

For example, she said, to keep costs down, an employer may decide not to hire employees if they or their family members have the potential for certain medical conditions.

"Employment should be related to a person's performance on the job," Grier said.

While genetic employment discrimination has not generated a large number of lawsuits, Grier said, it's a concern, especially as the public becomes more aware of genetic research.

These days, she said, many women know if they have a gene that indicates they are more likely to develop breast cancer.

The law covers businesses with 15 or more employees, along with labor unions, employment agencies and apprenticeship and training programs, according to BOLI, and it protects individuals or family members, including fetuses or embryos of those receiving fertility treatments.

The Genetic Information Nondiscrimination Act defines genetic tests as those that reveal, for example, a predisposition to breast cancer, colon cancer, Huntington's disease, or screening for cystic fibrosis or sickle-cell anemia.

Employers may test workers to determine if they have alcohol or illegal drugs in their systems. But they cannot test for employees' genetic predisposition to alcoholism or drug abuse.

The law allows several exceptions when obtaining genetic information would be allowed. They include:

—Overhearing the information inadvertently, or in a casual conversation, although probing follow-up questioning would be prohibited.

—Employees' participation in voluntary wellness programs, provided employers cannot access the information.

—Obtaining medical conditions to verify the need for leave under the Family and Medical Leave Act.

—Learning the information from publicly available sources, such as television, the Internet or publications.

Similarly, the law allows exceptions when disclosing genetic information would be allowed. They include:

—When it is requested in writing by the employee.

—When giving it to a health researcher.

—If it's in response to a court order.

—Providing it to government officials investigating compliance with the Genetic Information Nondiscrimination Act.

Given Oregon's history in prohibiting employment discrimination based on genetic information, complying with the new federal regulations should not require much more from businesses, Grier said.

"I think that it fits right in with the system employers use in (following) the Americans with Disabilities Act and the Family and Medical Leave Act," she said.

Discussion Questions

1. Does an employee have any specific constitutional protections against genetic screening for employment? If so, describe the specific constitutional protection(s).

Arguably, the right to privacy, interpreted by the federal courts as a constitutionally-protected right, would apply to genetic screening for employment. The operative question regarding this issue is whether the employer's "need to know" the information obtainable through genetic screening would outweigh the employee's right to privacy in his or her body, or vice versa.

2. As the article indicates, "Employers may test workers to determine if they have alcohol or illegal drugs in their systems. But they cannot test for employees' genetic predisposition to alcoholism or drug abuse." In terms of employer/employee rights, what is the difference between testing a worker to determine if they have alcohol or illegal drugs in their system, as opposed to testing for employees' genetic predisposition to alcoholism or drug abuse?

In the first instance, testing a worker to determine if they have alcohol or illegal drugs in their system relates directly to the employer's "need to know" (for example, to determine whether the employee is covered by worker's compensation for an accident, or whether the employee should be denied worker's compensation benefits due to the commonly-recognized drug/alcohol defense to worker's compensation liability). In the second instance, testing for an employee's genetic predisposition to alcoholism or drug abuse, the employee has no control over genetic predisposition, and just because someone is genetically predisposed to develop a condition does not translate into certainty that the condition will in fact develop. In the final analysis, genetic testing is more "invasive" than drug/alcohol testing, and is therefore a greater intrusion into the employee's right to privacy.

3. As the article indicates, the law allows several exceptions when obtaining genetic information would be allowed, including: a) overhearing the information inadvertently, or in a casual conversation (although probing follow-up questioning would be prohibited); b) employees' participation in voluntary wellness programs (provided employers cannot access the information); c) obtaining medical conditions to verify the need for leave under the Family and Medical Leave Act; and d) learning the information from publicly available sources, such as television, the Internet or publications. Comment on the propriety (or impropriety) of these exceptions.

Student opinions will likely vary in terms of the propriety or impropriety of these exceptions.

Article 2: "Representative Kucinich Sues over Olive Pit in Sandwich"

http://news.yahoo.com/s/ap/20110126/ap_on_re_us/us_kucinich_lawsuit

United States representative Dennis Kucinich of Ohio is suing a congressional cafeteria for dental damage he says he suffered after biting into an olive pit in a sandwich wrap he bought there.

Kucinich's attorney, Andrew Young, declined to comment recently on the lawsuit seeking $150,000 in damages from companies involved with the Longworth House Office Building cafeteria. A spokesman in Kucinich's congressional office also declined to comment.

The civil suit filed in January 2011 in the Superior Court of the District of Columbia said the wrap "contained dangerous substances, namely an olive pit," that a consumer would not reasonably expect to find in the product served. The suit said that Kucinich suffered "serious and permanent" dental and oral injuries requiring multiple surgical and dental procedures.

Kucinich's lawsuit said the Ohio Democrat bought the sandwich on or about April 17, 2008. He is seeking damages for "past and future medical and dental expenses, compensation for pain, suffering and loss of enjoyment and other damages."

The liberal congressman made an unsuccessful bid for the 2008 Democratic presidential nomination.

Two of the companies named in the suit, Compass Group USA Inc. and Performance Food Group Co., declined comment through spokespersons.

Article 2 Update: "Ohio's Kucinich Settles Olive-Pit-in-Sandwich Suit"

http://www.thesunnews.com/2011/01/28/1949050/ohios-kucinich-settles-olive-pit.html

United States representative Dennis Kucinich said recently that he settled a lawsuit filed against a Capitol Hill cafeteria over a split tooth he says he suffered when he bit into an olive pit in a sandwich wrap.

The lawsuit filed in early January 2011 in Washington had sought $150,000 in damages from companies involved with the Longworth House Office Building cafeteria. The lawsuit was settled for an undisclosed amount that reflected out-of-pocket costs, according to the parties involved.

The Ohio congressman said biting into the pit in April 2008 split a tooth down to the bone, caused excruciating pain and required reconfigured bridgework. The damaged tooth became infected, and

he suffered a reaction to an antibiotic and an intestinal obstruction that required emergency medical attention, Kucinich said.

The initial dental implant to replace the split tooth failed and required a second attempt, he said. None of the dental expenses were covered by insurance, he said.

Kucinich, a liberal who made an unsuccessful bid for the 2008 Democratic presidential nomination, said he was satisfied with the legal outcome.

"I feel that the defendants have responded fairly and reasonably," he said in a statement. "I don't want to have to make another dental visit for a very long time."

One company named in the lawsuit, Compass Group USA Inc., declined to release settlement terms.

"The parties have exchanged information and, after some investigation and discussion, have resolved the matter for an amount all parties believe reflects the actual out-of-pocket expenses related to this incident," the company said in a statement.

A second company named in the lawsuit, Performance Food Group Co., didn't immediately respond to a request for comment.

Discussion Questions

1. What are the various legal tests for determining whether a merchant has liability for consumer injury resulting from the consumption of a food or a drink product?

The two (2) legal tests for determining whether a merchant has liability for consumer injury resulting from the consumption of a food or a drink product are: a) the "natural substance/foreign substance" doctrine; and b) the "reasonable expectations/consumer expectations" test. Under the "natural substance/foreign substance" doctrine, the issue to be addressed is whether the substance found in the food is natural to the food, or foreign to the food. If the substance is natural to the food, there is likely no merchant liability for consumer injury; if, however, the substance is foreign to the food, the merchant is likely liable for consumer injury. Under the "reasonable expectations/consumer expectations" test, the issue to be addressed is whether a reasonable consumer would expect the substance found in the food to actually be in the food. If a reasonable consumer would expect the substance found in the food to actually be in the food, there is likely no merchant liability for consumer injury; if, however, a reasonable consumer would not expect the substance found in the food to be in the food, the merchant is likely liable for consumer injury.

2. As a follow-up to Discussion Question Number 1 above, in your reasoned opinion, which is a "better" (in other words, more just) test for determining whether a merchant has liability for consumer injury resulting from the consumption of a food or a drink product? Explain your response.

Based on your author's teaching experience, most students prefer the "reasonable expectations/consumer expectations" test, since this test is more "pro-consumer" than the "natural substance/foreign substance" test.

3. In your reasoned opinion, is Representative Dennis Kucinich's "olive pit" lawsuit an example of "frivolous" litigation justifying tort reform in the United States? Explain your response.

Student opinions in response to this question will likely vary. In your author's opinion, Representative Kucinich did have a viable cause of action in this case (assuming the facts occurred as alleged in the complaint); reasonable minds might differ, however, in terms of the amount of damages to which Representative Kucinich is entitled. Damages in such a case depend on the medical expenses incurred, the nature and extent of the pain and suffering caused by the injuries, and any other consequential damages incurred by the plaintiff.

Article 3: "U.S. Lags Behind in Offering Family Medical Leave"

http://www.msnbc.msn.com/id/41073926/ns/business-careers/

Lori Ames worked for a small New York public relations firm for 20 years and was only able to get two weeks of paid time off when her 22-year-old son was diagnosed with a brain tumor this past October.

Her employer could not provide any more of the paid time off she needed to take her son to chemotherapy and radiation. As a result, she ended up resigning a few weeks later.

"Having no income wasn't working for me," she said.

"I don't blame my employer because it was a small agency, but I was expecting more than I got," said Ames. "When you get laid off you get unemployment. When your son has a brain tumor you get nothing."

Ames was forced to go out on her own in order to bring in some money, and her situation is not unique. While the Family and Medical Leave Act — which entitles employees to take unpaid, job-protected leave for specified family and medical reasons — provides many workers with unpaid leave of up to 12 weeks, the system has a low participation rate, in part because many employees can't afford to take time off work without pay.

And paid family leave among U.S. companies is rare, with only 24 percent offering it, according to the Society for Human Resource Management, an advocacy group for human resource professionals.

Work-family advocates have argued that the United States lags behind other industrialized nations that offer government-mandated paid leave programs and should catch up. But such a benefit, many business advocates have long argued, will hurt company operations and cost jobs, especially during tough economic times.

Well, new evidence suggests that may not be entirely true.

California, which is one of only two states including New Jersey to have adopted a paid family leave program, was the first to implement it six years ago, and a study released last week on how the plan is doing found no economic Armageddon.

“For most employers it’s a non event and is no job killer,” said Eileen Appelbaum, senior economist at the Center for Economic and Policy Research and former Professor and Director of the Center for Women and Work at Rutgers University, one of the co authors on the “Leaves that Pay: Employer and Worker Experiences with Paid Family Leave in California.”

According to the study:

1) The majority of employers surveyed reported that paid family leave had either a “positive effect” or “no noticeable effect” on productivity, profitability or performance, turnover and employee morale.

2) Small businesses were less likely than larger establishments (those with more than 100 employees) to report any negative effects.

The one disheartening finding in the study was the number of employees actually taking advantage of the benefit was low.

The researchers found a variety of reasons for the low participation, including not knowing the benefit existed to fearing retaliation if they took the time off. About half of the employees surveyed

(who had a life event that would have been covered under the program) did not take advantage of it because they said they were unaware of the benefit. And 37 percent said they knew of the plan but feared taking leave would negatively impact their jobs.

One of the problems with California's paid family leave program is there are no protections for workers who are either fired or demoted for taking time off under the state plan. Economist Appelbaum recommends that the leave statute be amended to include job safeguards.

Even though fewer than expected workers took advantage of the program, a total of 1.2 million claims have been filed since the program started in 2004, according to the Employment Development Department, the agency that administers the plan. And in fiscal year 2010, there were 167,523 bonding leaves and 23,220 care leaves.

Among those employees who took the leave, Appelbaum continued, "it was very beneficial and enabled them to better care for a new baby or an ill family member." The study found that nearly 80 percent said they were "very satisfied" or "somewhat satisfied" with the length of their family leaves; and 95 percent said they returned to their employer after taking the leave.

The study found that nearly 80 percent said they were "very satisfied" or "somewhat satisfied" with the length of their family leaves. And 95 percent said they returned to their employer after taking the leave.

California's plan works as a type of insurance and piggybacks on the state's existing disability insurance system. Employees, not employers, pay into the pool through a payroll tax, and it's available to full-time and part-time workers. It provides for six weeks per year of paid family leave for employees at 55 percent of their weekly salary (up to $987) for everything from bonding with a new born to caring for a seriously ill family member.

Such paid leave policies, Appelbaum said, should be adopted nationally, especially given the findings in California that show little impact on companies.

In fact, there's a growing movement to do just that. In addition to New Jersey passing paid leave legislation, Washington State passed a paid parental leave law, but it has yet to be funded. Other

states are considering similar laws, including Arizona, Illinois, Maine, Massachusetts, Missouri, New Hampshire, New York, Oregon and Pennsylvania.

However, some business advocates still see paid leave programs on the state or federal level as a bad idea.

"Even if the statistics in California support no adverse impact, I'm looking at it from a psychological value [standpoint]," said David Lewis, president of OperationsInc, an HR outsourcing and consulting firm. During times of economic uncertainty, he continued, it puts an added burden on businesses.

"At a time when so much of the emphasis is placed on creating jobs, it will potentially have an adverse impact on any job creation effort," he noted.

Julie Manning Magid, associate professor of business law at Indiana University's Kelley School of Business, says California's experience with paid leave is an anomaly when it comes to most states in the nation. The state, she said, "has so many pro-employee laws and standards that this would only be added to a base of things people can already take advantage of. That is vastly different than many parts of country, including Indiana."

Magid stressed that paid family leave would be a great benefit for workers, but she doesn't think it's practical right now. The focus, she added, should instead be on fixing the Family and Medical Leave Act, which has a low participation rate and doesn't cover employees who work for smaller firms.

Providing paid leave could potentially hurt smaller companies or companies with smaller margins, said Ashley Brightwell, an employment attorney with Alston & Bird. Making arrangements to allow workers to take time off to care for family could have negative consequences for those businesses, she said, adding that she would like to see how the California program plays out longer term as more employees take advantage of it.

Life Inc.: Trading isn't brain surgery, but the pay is better

"If employers have no negative effect then it's a win-win," she noted.

Proceedings

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Some employers — especially those that provide better-paying white-collar jobs — see providing a benefit such as paid family leave as a win-win right now.

"It's important for us to have generous paid leave policies because [they help] our people to be great parents and to develop strong relationships with their families," said Billie Williamson, partner and Americas Inclusiveness Officer with Ernst & Young. "In return, we have happier employees who are motivated, productive, and stay with our firm."

Ted Phai Chung, an analyst with Ernst & Young's People Team Integration & Operations, was able to get two weeks off with full pay after his son Liam was born on June 4, and then he got another four weeks paid leave when his son was about three months old and his wife had returned to work.

"It was great for morale to have this," he said. "Knowing I could (and did) take advantage of it — a once in a lifetime opportunity to bond with my child and learn how to be a parent and learn how to be a better husband."

Discussion Questions

1. Describe the provisions of the Family Medical Leave Act (FMLA).

According to the United States Department of Labor website (www.dol.gov):

The Family and Medical Leave Act (FMLA) provides certain employees with up to 12 weeks of unpaid, job-protected leave per year. It also requires that their group health benefits be maintained during the leave.

FMLA is designed to help employees balance their work and family responsibilities by allowing them to take reasonable unpaid leave for certain family and medical reasons. It also seeks to accommodate the legitimate interests of employers and promote equal employment opportunity for men and women.

FMLA applies to all public agencies, all public and private elementary and secondary schools, and companies with 50 or more employees. These employers must provide an eligible employee with up to 12 weeks of unpaid leave each year for any of the following reasons:

1) For the birth and care of the newborn child of an employee;

2) For placement with the employee of a child for adoption or foster care;

3) To care for an immediate family member (spouse, child, or parent) with a serious health condition; or

4) To take medical leave when the employee is unable to work because of a serious health condition.

Employees are eligible for leave if they have worked for their employer at least 12 months, at least 1,250 hours over the past 12 months, and work at a location where the company employs 50 or more employees within 75 miles. Whether an employee has worked the minimum 1,250 hours of service is determined according to FLSA principles for determining compensable hours or work.

2. Aside from the fact that FMLA leave is unpaid, might there be other reasons why the system has such a low employee participation rate?

An employee may feel that the employer will view the employee as "expendable" while he or she is out on leave; further, the employee may fear employer retaliation in response to taking the leave, even though such retaliation is a violation of the FMLA.

3. Assess the "California" paid family leave program. In your reasoned opinion, is the California plan preferable to standard FMLA coverage? Explain your response.

This is an opinion question, such responses may vary, but the student's opinion will likely depend on whether he or she takes an employer or employee perspective in answering this question. Obviously, an employer would likely disfavor paid coverage due to the cost factor (not just because of the money involved in the paid leave, but also due to paid leave incentivizing the employee to "find a reason" for taking the leave), while an employee would likely favor the paid leave as an additional employment benefit.

Proceedings

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Video Suggestions

Video 1: "Man Fired for Wearing Packers Tie"

http://www.wgntv.com/videobeta/?watchId=14ccbc0d-4ef1-49cf-83c1-844d97ba27f0

Discussion Questions

1. Describe the "employment-at-will" doctrine. How, if at all, does the employment-at-will doctrine apply to the employee termination decision in this case?

From an employer's perspective, employment-at-will means "fire at will." This doctrine empowers an employer to fire an employer for any reason, or for no reason at all (provided that the employer does not discharge the employee in violation of the Civil Rights Act of 1964 or any other law prohibiting a specific form of discrimination in employment.) As applied to this case, the employment-at-will doctrine means the employer can fire its employee for wearing a Packers tie, a Steelers tie, a Cowboys tie, etc. Since the doctrine allows an employer to terminate an employee for no reason at all, certainly having a reason (for example, offending Bears fans in the greater Chicagoland area—the Chicago Bears and the Green Bay Packers are NFL football rivals--or offending the Bears football team, which has an advertising relationship with the dealership) would be more than enough justification for terminating the employee.

2. Describe the "wrongful termination" doctrine. How, if at all, does the wrongful termination doctrine apply to the employee termination decision in this case?

The wrongful termination doctrine holds that in spite of the general employment-at-will right, there are some situations where the right should not apply, and the employee should not be terminated. Some examples include:

a) Discrimination--The employer cannot terminate employment because the employee is of a certain race, nationality, religion, sex, age, or in some states, sexual orientation.

b) Retaliation--An employer cannot fire an employee because the employee filed a claim of discrimination or is participating in an investigation for discrimination. This "retaliation" is forbidden under civil rights law.

c) Employee's Refusal to Commit an Illegal Act--An employer is not permitted to fire an employee because the employee refuses to commit an act that is illegal.

d) Employer Not Following Its Own Termination Procedures--Often, the employee handbook or company policy outlines a procedure that must be followed before an employee is terminated. If the employer fires an employee without following this procedure, the employee may have a claim for wrongful termination.

Obviously, none of the commonly-recognized exceptions apply in this case. The wrongful termination theory is "rooted" in public policy, and termination in the instant case does not appear to be a violation of public policy, especially since the employer had an articulated basis for terminating employment (offending the Chicago Bears, an organization that had an advertising relationship with the dealership, and perhaps customers who also happened to be Bears fans!)

3. As the video indicates, there was no company policy, spoken or written, stipulating that only Chicago sports logos could be displayed on company property. How, if at all, should the absence of such a policy affect the analysis of this case?

In your author's opinion, the absence of a company policy stipulating that only Chicago sports logos could be displayed on company property does not significantly affect the analysis of this case. Even in the absence of such a policy, it should be reasonable for an employee to assume that wearing apparel that might foreseeably offend customers and/or other company stakeholders (such as advertisers) could be grounds for employee sanction, including dismissal.

Video 2: "Settlement Recovers $7.2 Billion for Madoff Victims"

http://www.cbsnews.com/video/watch/?id=7161103n

Discussion Questions

1. In your opinion, should the estate of Jeffry Picower be responsible for reimbursing Madoff investors $7.2 billion? Does it matter whether Mr. Picower had actual knowledge of the Madoff Ponzi scheme?

The $7.2 billion is "fruit of the poisonous tree," inextricably linked to the largest Ponzi scheme in the history of the United States. Monies derived illegally, especially through fraud, should revert back to the original owners of the proceeds. In your author's opinion, Mr. Picower either knew or should have known of the scheme, which further justifies "reversion back" of the funds.

2. As trustee, what are the responsibilities of Mr. Irving Picard?

As trustee, Mr. Picard represents the victims of the Madoff Ponzi scheme; accordingly, his primary responsibility is to maximize the "corpus" (the body) of the trust, so that victims of the fraud can recover at least a sizable portion of their investments.

3. As the video indicates, the $7.2 billion settlement is the largest single civil settlement in United States history. In acknowledgement of that fact, do you believe that justice has finally been served in this case? Why or why not?

In your author's opinion, yes and no. Yes, in the sense that the Mr. Picard's recovery of a sizeable percentage of the Ponzi scheme proceeds is commendable, especially since too many victims of fraud too often receive little or nothing in restitution. No, in the sense that the Madoff victims will never recover full reimbursement.

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This section of the newsletter addresses the scope and coverage of the "anti-retaliation" provisions of Title VII of the 1964 Civil Rights Act.

Ethical Dilemma

"Supreme Court Rules Man Can Sue Firm for Retaliation"

http://www.usatoday.com/news/washington/judicial/supremecourtopinions/2011-01-24-retaliation_N.htm?loc=interstitialskip

A man who was fired after his fiancée at the same company claimed sex discrimination can sue for retaliation, the Supreme Court ruled unanimously recently.

"We think it obvious that a reasonable worker might be dissuaded from (filing a claim) if she knew that her fiancé would be fired," Justice Antonin Scalia wrote for the court, clarifying federal protection against reprisals when a worker complains to officials about bias.

The Supreme Court's decision reverses some lower U.S. courts' narrow view of the anti-retaliation provisions of Title VII of the 1964 Civil Rights Act and reinforces the stance of the Equal Employment Opportunity Commission, which enforces Title VII.

Eric Thompson and his then-fiancée Miriam Regalado worked at North American Stainless (NAS) in Kentucky. (They are now married.) Regalado claimed she was twice demoted because of her sex and that she was paid less than male workers. Three weeks after the U.S. Equal Employment Opportunity Commission notified the company in early 2003 about her charge, Thompson was fired.

Thompson sued, and lower courts ruled that federal law prohibiting job bias does not allow third-party retaliation claims. The U.S. Court of Appeals for the 6th Circuit said that because Thompson had not filed the original bias claim, he was not covered by Title VII's anti-retaliation provision.

The Supreme Court reversed. Justice Scalia noted that Title VII prohibits any employer action that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination."

He said that Thompson meets the definition of an "aggrieved" worker under Title VII: "Thompson was an employee of NAS, and the purpose of Title VII is to protect employees from their employers' unlawful actions. Moreover, accepting the facts as alleged, Thompson is 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 Regalado."

Newest Justice Elena Kagan, a former U.S. solicitor general, did not participate in the case of *Thompson v. North American Stainless*. The U.S. government had backed Thompson in the case.

Discussion Questions

1. Assess the United States Supreme Court decision in this case. Do you approve or disapprove of the court's decision? Explain your response.

Student opinions will likely vary in response to this question.

2. Are you surprised that the Supreme Court was unanimous in its decision? Are you surprised that Justice Scalia wrote for the court in support of a finding of retaliation?

A unanimous United States Supreme Court decision is admittedly a surprise, since so many Supreme Court decisions are decided by a slim (often one-vote) majority. Justice Scalia often "tows the ideological line" in terms of his conservative principles, so in your author's opinion, it is at least somewhat of a surprise for Justice Scalia to not only favor an expansion of the anti-retaliation provisions of Title VII to third parties, but to even write the decision for the court. Keep in mind that Justice Scalia recently claimed in a media interview that women do not have the right to equal protection under the constitution!

3. Why did Justice Elena Kagan not participate in the case?

In refusing to participate in the case, Justice Kagan arguably made the "correct" (i.e., proper) decision. As the article indicates, Justice Kagan was a United States solicitor general before becoming a Supreme Court justice, and the United States government had favored the plaintiff in this case. By not participating in the case, Justice Kagan is avoiding the appearance of impropriety, since she may have preconceived notions of liability based on her prior legal relationship to the case.

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Of Special Interest

This section of the newsletter will assist you in covering:

1) Article 3 ("U.S. Lags Behind in Offering Family Medical Leave"); and

2) Video 2 ("Settlement Recovers $7.2 Billion for Madoff Victims").

Teaching Tips

Teaching Tip 1 (Related to Article 3—"U.S. Lags Behind in Offering Family and Medical Leave"): U.S. Department of Labor FMLA Web Site

http://www.dol.gov/whd/fmla/

Teaching Tip 2 (Related to Video 2—"Settlement Recovers $7.2 Billion for Madoff Victims")

Note: You may want to use the following article to accompany class discussion of Video 2:

"Judge Approves $7.2 Billion Madoff Settlement"

http://www.cbsnews.com/stories/2011/01/13/business/main7243097.shtml?tag=stack

A bankruptcy judge approved a historic $7.2 billion deal recently to settle a lawsuit brought against the estate of one of the oldest and wealthiest clients of disgraced financier Bernard Madoff.

U.S. Bankruptcy Judge Burton Lifland signed off on the deal at the urging of a court-appointed trustee seeking to recover funds for thousands of investors burned by Madoff's epic Ponzi scheme.

Trustee Irving Picard and federal authorities reached the settlement last month with the estate of Jeffry Picower, a businessman and philanthropist who drowned in 2009 after suffering a heart attack in the swimming pool of his Palm Beach, Florida, mansion. Federal prosecutors have called the forfeiture the largest in Justice Department history.

Picard had sued Picower, alleging his earnings from Madoff consisted of money stolen from other investors. However, Picower's widow has insisted he was in the dark about the fraud and he was never charged with a crime.

Madoff, 72, is serving a 150-year prison term after admitting that for decades he used fraudulent account statements to trick investors into believing they had more than $60 billion invested in stocks. Investigators found, though, that no investments were made, and that an estimated $20 billion in principal was simply being paid out bit by bit to other investors.

Authorities have said the Picower deal, combined with smaller seizures and settlements, means that half of the $20 billion has now been recovered and could be returned to victims. But it's unclear who will end up benefiting and when: Picard has authorized payments to fewer than 2,400 of the nearly 16,500 Madoff customers who filed a claim for a share of recovered money.

Some investors who can't qualify for the trustee payments either because they invested indirectly with Madoff or withdrew more than they originally invested have objected to the Picower settlement, arguing that it dries up funds they had a right to recover.

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Chapter Key for McGraw-Hill/Irwin Business Law Texts

	Hot Topics	Video Suggestions	Ethical Dilemma	Teaching Tips
Kubasek et al., Dynamic Business Law	Chapters 8, 9, 10, 42, 43 and 45	Chapters 7, 42 and 43	Chapters 42 and 43	Chapters 7, 42 and 43
Kubasek et al., Dynamic Business Law: The Essentials	Chapters 5, 14, 24 and 25	Chapters 2 and 24	Chapter 24	Chapters 2 and 24
Mallor et al., Business Law: The Ethical, Global, and E-Commerce Environment, 14th Edition	Chapters 7, 20 and 51	Chapters 5 and 51	Chapter 51	Chapters 5 and 51
Barnes et al., Law for Business, 10th Edition	Chapters 7, 20 25 and 46	Chapters 5 and 25	Chapter 25	Chapters 5 and 25
Brown et al., Business Law with UCC Applications Student Edition, 12th Edition	Chapters 6, 19, 20, 35 and 36	Chapters 5, 35 and 36	Chapters 35 and 36	Chapters 5, 35 and 36
Reed et al., The Legal and Regulatory Environment of Business, 15th Edition	Chapters 10, 17, 19, 20 and 21	Chapters 12, 19, 20 and 21	Chapters 19, 20 and 21	Chapters 12, 19, 20 and 21
McAdams et al., Law, Business & Society, 9th Edition	Chapters 7, 12, 13, 14 and 15	Chapters 2, 12, 13 and 14	Chapters 12, 13 and 14	Chapters 2, 12, 13 and 14
Melvin, The Legal Environment of Business: A Managerial Approach	Chapters 9, 10, 11, 12 and 21	Chapters 10, 11, 12 and 22	Chapters 10, 11 and 12	Chapters 10, 11, 12 and 22

This Newsletter Supports the Following Business Law Texts:

Barnes et al., Law for Business, 10th Edition, 2009© (007352493X)
Brown et al., Business Law with UCC Applications Student Edition, 12th Edition, 2009© (0073524948)
Kubasek et al., Dynamic Business Law, 2009© (0073524913)
Kubasek et al., Dynamic Business Law: The Essentials, 2010© (0073377686)
Mallor et al., Business Law: The Ethical, Global, and E-Commerce Environment, 14th Edition, 2010© (0073377643)
McAdams et al., Law, Business & Society, 9th Edition, 2009© (0073377651)
Reed et al., The Legal and Regulatory Environment of Business, 15th Edition, 2010© (007337766X)
Melvin, The Legal Environment of Business: A Managerial Approach, 2011© (0073377694)