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MANAGEMENT RIGHTS

A Labor Relations newsletter for clients of ROEMER WALLENS GOLD & MINEAUX LLP designed to provide relevant information to public sector managers on matters relating to the labor relations environment in government.

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U.S. SUPREME COURT EXPANDS TITLE VII'S ANTI-RETALIATION PROVISIONS

On January 24, 2010, the U.S. Supreme Court decided Thompson v. North American Stainless, LP, 562 U.S. __ (2011), and effectively expanded protection against retaliation to persons "associated with" an employee who has engaged in Title VII protected activity, i.e. filed a discrimination complaint or participated in a discrimination investigation. Miriam Regalado filed a sex discrimination charge against her employer, North American Stainless, with the EEOC. Three weeks later, the employer fired Eric Thompson, Regalado's fiancé. The U.S. Supreme Court unanimously held that Thompson could bring a Title VII retaliation claim against the employer even though Thompson never engaged in a Title VII protected activity.

In so holding, the Court reasoned that discrimination under the anti-retaliation provision of Title VII includes any employer action that "might have dissuaded a reasonable worker from making or supporting a charge of discrimination." The Court found that "a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiancée would be fired." However, Title VII only permits a "person claiming to be aggrieved" to file a charge with the EEOC. The Court concluded that a "person aggrieved" must mean anyone with an interest Title VII seeks to protect. Thompson fell within this zone of interest because the employer tried to punish Regalado by harming Thompson. Therefore, a person can file a charge with the EEOC any time the employer's action against a third party constitutes prohibited retaliation under the meaning and purpose of Title VII. While not providing a bright line rule, the Court stated that firing a close family member will "almost always" meet the standard, and retaliating against a "mere acquaintance" will almost never meet it, but declined to provide further guidance.

The significance of the Court's decision is that it broadens the scope of Title VII's anti-retaliation provisions to protect individuals who have a significant association with or relation to employees who have engaged in protected conduct. Employers are now open to retaliation claims any time it takes any adverse employment action against someone "associated" with an employee who has engaged in protected activity.

EARLY RETIREMENT INCENTIVE UPHELD BY APPELLATE DIVISION

Chapter 45, also known as the "55/25 Legislation", was signed into law by Governor David Paterson on April 14, 2010 and creates an early retirement incentive for employees in positions represented by collective bargaining units affiliated with the New York State United Teachers ("NYSUT"). Under this law, employees who belong to either the New York State Employee Retirement System or the New York State Teachers Retirement System, who are at least 55 years of age and have attained at least 25 years of creditable service may retire without the reduction in retirement benefits that would normally apply to retirement system members who are on Tiers 2, 3, or 4, and who do not have 30 years of service.

The Empire State Supervisors and Administrators Association ("ESSAA"), a union that represents primarily administrators and supervisors in public school districts, challenged the 55/25 Legislation contending that it violates its members' rights to equal protection and freedom of association under the United States and New York State Constitutions since the 55/25 Legislation limits eligibility for early retirement to individuals who are employed in positions represented by collective bargaining units affiliated only with NYSUT.

On July 23, 2010, the Supreme Court of Albany County found the legislation constitutional, and ESSAA appealed to the Appellate Division, Third Department. The Third Department unanimously affirmed the trial court's decision on January 20, 2011. The Third Department held that a rational basis exists for distinguishing between employees in NYSUT-affiliated bargaining units and employees not in NYSUT-affiliated bargaining units. Replacing administrators and supervisors is not as financially advantageous as replacing older classroom teachers. Generally speaking, supervisors and administrators are replaced by individuals closer in seniority and salary to the incumbents, while older classroom teachers are usually replaced by newer teachers who can be paid significantly less than the incumbents. Sullivan v. Patterson, 2011 N.Y. Slip. Op. 327, *6-*7 (3d Dep't 2011).

The payment of the unreduced retirement benefits for those teachers who retired under the 55/25 Legislation remains subject to the final outcome of any appellate process. Therefore, whether the Appellate Division, Third Department's decision is appealed and brought before the New York Court of Appeals is of great importance. ESSAA has 30 days from the date of the Appellate Division, Third Department's decision to apply for permission to appeal to the Court of Appeals.

EMPLOYEE SPEECH & E-MESSAGING

The advent of e-messaging has created new means for employees to communicate, raising novel issues and problems for employers. E-messaging, or electronic messaging, includes blogging, text messaging, instant messaging and social networking services such as Facebook, Twitter and MySpace, to communicate. These technologies and services have become an essential communication tool.

The question of when an employee may be subject to discipline for posting material on websites involves consideration of whether the content is protected speech under the First Amendment and the impact of the employee's actions upon the workplace. As a general rule, a public employer may not take adverse action against a public employee on a basis that infringes his constitutional rights. However, whether the speech occurs on- or off-duty will affect the analysis.

In the landmark decision of Garcetti v. Ceballos, 547 U.S. 410 (2006), the U.S. Supreme Court held that where a public employee is speaking as an employee, he may be disciplined for the content of his speech. The Court established a two step-framework for examining employee speech. First, it must be determined "whether the employee spoke as a citizen on a matter of public concern. If the answer is no, the employee has no First Amendment cause of action based on his or her employer's reaction to the speech." Id. at 418. If the employee spoke as a citizen on a matter of public concern, then the analysis must proceed to the second step. Id. The second step requires a determination of "whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public." Id. Essentially, this requires an examination of whether the speech affects the employer's operations. Id.

Public employees enjoy greater speech protections off-duty. However, this does not prohibit public employers from disciplining employees for speech made off-duty. Moreover, courts have found that employees do not have reasonable expectation of privacy regarding what one posts on their social networking pages such as Facebook and MySpace. *See* Romano v. Steelcase Inc., 2010 N.Y. Slip Op. 20388 (Sup. Ct. 2010).

In Curran v. Cousins, 509 F.3d 36 (1st Cir. 2007) an employee was discharged for posting messages on the discussion board of his union website that compared his superiors to Hitler. Although the Court found that a portion of the employee's postings had public interest value, it held that it did not follow that this rendered all of his speech protected. Id. at 46. The court emphasized the fact that the speech posed a "substantial risk of disruption to the department". Id. at 49. It therefore found that the employee's First Amendment rights had not been violated by his termination.

Nevertheless, employers cannot discipline employees for engaging in protected activity, e.g. union related business. The National Labor Relations Board ("NLRB"), the federal agency that investigates unfair labor practice allegations, has filed a complaint against a Connecticut company that fired an employee because she posted critical messages about her boss on Facebook. The employee posted the negative comments from her own computer on her own time. However, the employee's disparaging remarks drew compliments and discussions from her fellow employees. The NLRB found that the employee's Facebook postings constituted protected concerted activity; the employee was discussing the terms and conditions of her employment with co-workers. The case is set for hearing in February and could set a difficult precedent for employers as more employees are using social networking sites to talk about their jobs.

SAME- SEX BEREAVEMENT RIGHTS

Effective October 29, 2010, employers in New York State must provide the same funeral and bereavement leave to employees in same-sex committed relations that they provide to married couples. The new law amends §79-n of New York's Civil Rights Law. The law defines "same-sex committed partners" as "those who are financially and emotionally interdependent in a manner commonly presumed of spouses."

The new law does not require that employers offer funeral or bereavement leave. However, if an employer provides leave for the death of an employee's spouse or the child, parent or other relative, the employer must also provide the same leave for the death of an employee's same-sex committed partner, or the child, parent or other relative of the partner. Accordingly, employers should amend their leave policies to comply with this new law.

FIRM NEWS:

Welcome to our newest Associate, Jonathan H. Kerr, who will concentrate his practice in litigation.