

# THE EMPLOYER'S ADVISORY

A QUARTERLY NEWSLETTER

HIGHLIGHTING CURRENT EMPLOYMENT LAW ISSUES

PREPARED BY ATTORNEYS BETTY BECHTEL, MICHAEL SANTO, JULIE SPRINKLE AND ALICIA WILLIAMS

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BECHTEL & SANTO, L.L.P.

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## “ZONE OF INTERESTS” STANDARD FOR TITLE VII RETALIATION

Jack and Jill work for XYZ, Inc. and are engaged to be married. Jill filed a sex discrimination complaint against XYZ with the EEOC after it denied her a promotion. She never told Jack about her complaint because she didn't think he would be supportive. But then, XYZ fired Jack without telling him why, relying on its “at will” right to terminate him. Upon hearing this, Jill told Jack about her pending sex discrimination charge, and they concluded that Jack's firing must be to punish Jill for filing a charge with the EEOC. So, Jack filed suit against XYZ claiming illegal retaliation in violation of Title VII. Can Jack win? You betcha!

Title VII prohibits employers from retaliating against an employee for engaging in the protected activity of bringing a charge or claim of discrimination against the employer based on sex, race, national origin or religion. The U.S. Supreme Court recently expanded this prohibition to protect third parties who have not engaged in protected activity, but who are within the “zone of interest” covered by the statute.

In *Thompson v. North American Stainless, LP*, 2011 WL 197638, Miriam Regalado filed a

sex discrimination charge against her employer. Three weeks later, the company fired her fiancé, Eric Thompson, who was also an employee. Thompson sued claiming that his firing was in retaliation for Regalado's discrimination charge. Both lower courts dismissed Thompson's claim on the basis that Title VII does not protect third parties who have not engaged in any protected activity. After all, Thompson never claimed sex discrimination against the company, and there was no evidence that he was a witness against the company or otherwise involved in actions to promote his fiancée's discrimination charge. But the Supreme Court reversed stating that if the facts Thompson alleges are true, his firing constituted unlawful retaliation: “Title VII's antiretaliation provision prohibits any employer action that well might have ‘dissuaded a reasonable worker from making or supporting a [discrimination] charge.’” A reasonable worker obviously might be dissuaded from engaging in protected activity if she knew that her fiancé would be fired.

The Court explained that Thompson was a “person aggrieved” because he was within the “zone of interests” sought to be protected by Title VII. He was an employee, and Title VII's purpose is to protect employees from their employers' unlawful actions. Moreover, accepting the facts as alleged, Thompson was not an accidental victim of the retaliation; hurting him was the unlawful act by which the company punished Regalado.

The company argued that prohibiting reprisals against third parties will lead to difficult line-drawing problems concerning the types of relationships entitled to protection: “Perhaps retaliating against an employee by firing his fiancée would dissuade the employee from engaging in protected activity, but what about firing an employee’s girlfriend, close friend, or trusted co-worker?” The company asserted that the “zone-of-interests” standard will place the employer at risk any time it fires any employee who happens to have a connection to a different employee who filed a charge with the EEOC. While the Court admitted that the company had a point, it held that such a concern did not justify “a categorical rule that third-party reprisals do not violate Title VII” and “a preference for clear rules cannot justify departing from statutory text.” The Court declined to identify a fixed class of relationships for which third-party reprisals are unlawful, stating that “[w]e expect that firing a close family member will almost always meet the [zone of interests] standard, and inflicting a milder reprisal on a mere acquaintance will almost never do so, but beyond that we are reluctant to generalize.” So, while the Court left this to be decided by the particular circumstances of the case, it emphasized that an objective standard must be used to avoid the uncertainties and unfairness of basing a decision on a plaintiff’s “unusual subjective feelings.”

What does this mean for employers? In short, it means more opportunities to be sued under Title VII, particularly where the company has spouses, significant others, or closely-related individuals working for the company and one complains of discrimination in violation of Title VII. Such a complaint gives not only the complaining party legal protection against retaliation, it now gives other employees with whom the complainant has a close relationship

protection from retaliation, even if the related employee has done nothing with the other matter.

In our example, XYZ did not do itself a favor by firing Jack without cause. Perhaps XYZ had a legitimate reason for the discharge, like suspected theft of company property, but giving this reason for the first time after Jack brings a claim will look suspicious. The Supreme Court’s *Thompson* decision adds one more reason why employers should know the legal reason for terminating an employee and advise the employee of that reason at the time of discharge, even if the employment is “at will.”

### **FMLA DILEMMA: A PRACTICAL**

Your company, ABC, Inc., scheduled Alan Apple to attend a local, two-week conference. Shortly after the conference began, Apple received an urgent phone call that his mother was seriously ill. But Apple did not inform his supervisor until later the next day when he emailed to say that he apologized for not contacting anyone earlier. Apple then stated, “I need the next couple days off to make arrangements for my Mother.... I do have the vacation time, or I could apply for the family care act, which I do not want to do at this time.”

Apple then “disappeared” for the next 9 days, during which he made no contact with anyone at ABC despite receiving more than a dozen calls from his supervisor. Finally, after 9 days, Apple contacted his supervisor, who was so steamed about Apple’s repeated non-contact with him that he demands the organization fire Apple for violating the organization’s call-in policy. What do you do?

The first question, after we assume that Apple and ABC meet the basic thresholds under the FMLA, would, of course, be to determine if Apple

even requested FMLA. Generally speaking, it does not take much for an employee to invoke his FMLA rights; he must simply provide enough information to place the employer on notice of a probable basis for FMLA leave. The applicable regulations make clear that an employee need not expressly assert rights under the FMLA or even mention the FMLA in order to invoke his rights. So, in this case, Apple's email to XYZ indicating a need to care for a seriously ill parent would be sufficient to invoke the protections of the FMLA. But that said, numerous cases also suggest that an employee may waive his FMLA rights if he clearly expresses to his employer that he does not wish to use the protections of the FMLA. In this case, it's unlikely that a court will determine that Apple clearly waived his FMLA rights since his email contained a qualifier; "I don't want to [apply for FMLA] at this time" versus, something like, "whatever you do, don't treat this as FMLA because I don't want to use that leave."

So, if we assume that Apple did not waive his right to FMLA in that telephone message, the burden shifts to ABC to take certain affirmative steps. In particular, after notice is given, the employer has a duty to provide a written explanation of the employee's rights and responsibilities under the FMLA and a duty to make further inquiry if additional information regarding FMLA leave is needed. In this scenario, ABC attempted to fulfill its obligation to inquire further. After all, as soon as his supervisor received Apple's email, he called Apple repeatedly in an effort to learn more about the situation.

Ultimately, Apple's failure to respond to his supervisor's calls or otherwise contact his employer for 9 days will, more than likely, doom his FMLA claim. The FMLA does not authorize employees to keep their employers in the dark

about when they will return from leave. Indeed, employers are entitled to the sort of notice that will inform them not only that the FMLA may apply, but also when a given employee will return to work.

And in situations like this one involving unforeseeable leave, the employee must provide notice to his employer about the anticipated duration of his leave as soon as practicable. 29 C.F.R. § 825.303(a). So, in the end, an employee like Apple who fails to comply with this notice requirement is not entitled to FMLA protection.

Of course, when the need for leave is unforeseeable, the employee will sometimes not know exactly how much leave he will need. But the employee must at least communicate this fact to the employer, together with an estimate of the likely duration of the requested leave, and medical certification if required by the employer.

**Practical Tip.** This situation is based on an actual case: *Righi v. SMC Corp.*, 2011 WL 547364. But even though the employer in that case successfully proved that the employee failed to give it sufficient notice regarding his request for leave, the employer would have been better off providing the employee written notice that it needed information regarding the employee's request for leave after receiving that initial phone call.

## **EXPANDING THE SCOPE OF "EMPLOYER" UNDER TITLE VII**

It is important for employers to know which federal laws apply to their businesses. For example, Title VII applies to employers "who ha[ve] fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person." 42 U.S.C. §2000e(b). Employers with

companies in a parent-subsidary relationship need to be aware that the two entities can be counted together when determining whether an employer has the requisite 15 employees. Counting a parent company and a subsidiary company as one is done when the parent company “exercises [a large degree of control] over policy making and the means and manner of an employee’s work performance” and when the “management structure [is] intertwined.” *Bayard v. Riccitelli*, 952 F.Supp. 977.

A new case from a Puerto Rico court expands the situations in which companies are considered a single employer for purposes of determining whether the defendant has 15 employees and is therefore subject to Title VII. In *Arroyo-Perez v. Demir Group International*, Haygo Demir owned the defendant Demir Group. Demir Group consisted of “DGI Canada” and “DGI Florida.” In all, the Florida company employed seven employees in the United States and Territories, and the Canada company employed 12 employees. Mr. Demir was the president, secretary, treasurer, officer, and sole shareholder of both DGI companies. DGI Group defended this Title VII lawsuit on the grounds “that neither [Demir Group company] has the requisite 15 employees to be considered an employer for Title VII purposes.” Indeed, it argued that “DGI Canada employees, as citizens from another country working outside the United States, should not be counted to reach the statutory minimum of fifteen employees.”

The Puerto Rico Court held that the employees of “both companies should be counted together for the purpose of determining whether the defendants meet the Title VII numerosity requirement.” And it cited a decision out of the 9<sup>th</sup> Circuit that found that “[t]he fact that some of the

employees of the integrated enterprise are not themselves covered by the federal antidiscrimination law does not preclude counting them as employees for the purposes of determining Title VII coverage.” 733 F.Supp.2d 322.

**What should employers do?** The *Arroyo-Perez* case was decided in a district far, far away from Colorado and it is not binding on Colorado. Also, DGI Group may appeal the issue and an appeal court could reverse the decision. But for now, employers should be aware that some courts might consider all of its companies to be a single employer for Title VII purposes if there is common ownership and control, even if some of the employees reside and work outside the United States. If an employer finds itself in this position, the employer may consider adopting policies that direct employees to refrain from violating Title VII’s anti-discrimination laws. Implementing such a policy would serve as a safety net for employers who might someday be in DGI Group’s position.

## ON-CALL, BUT OFF THE CLOCK

Employers with on-call employees will be thrilled to know that in *Taunton v. Genpak, LLC*, the Alabama District Court recently denied the claim of two disgruntled employees who demanded pay for the time they were on-call, but not working.

James Taunton and Arthur Malone, maintenance employees of Genpak, felt Genpak should compensate them for having to participate in an on-call rotation wherein they were on-call for seven consecutive days every fourth or fifth week. While on-call, they had to wear a pager at all times, answer the page within an hour of being paged, and, if needed, report to work within an hour and a half of being paged. The employees weren’t paid for this on-call time, but if called in, they received

overtime pay for at least four hours of work, whether they worked four hours or not.

The employees felt that while on-call, their normal life activities were “put on hold” to a degree that those on-call hours should be compensated. For example, before Taunton went fishing, he called in to “make sure that everything was running good” and he, once, even had to *stop* fishing to answer a call. Also, he had to “think about it” if he wanted a beer.

The Court didn’t agree with the employees’ theory, and granted summary judgment to Genpak. In making its decision, the Court considered the ability of the employees to engage in personal activities while on-call and the agreement between the parties. In determining whether the employees could engage in personal activities while on-call, it applied a multi-part test: 1) *whether there was an on-premises living requirement*: here, the employees didn’t have to remain on Genpak’s premises or within hailing distance while on call; 2) *whether there were excessive geographical restrictions*: these employees had no real restrictions; they could enjoy the comfort of their own home or go out to engage in a range of personal activities, as long as they could return to the plant within an hour and a half of being paged; 3) *whether the employees could easily trade on-call duties*: here, they could trade duties, if needed; 4) *whether the frequency of calls was unduly restrictive*: they didn’t have to report to work that often. Over a 3-year span, Taunton reported to work 10 times per year, on average, and Malone, an average of 5.1 times; 5) *how often the employees were on-call*: they were only on call every fourth or fifth week; and 6) *whether the employee actually engaged in personal activities*: here, they admitted they engaged in a range of personal activities, both at home and away,

including watching television, entertaining guests, shopping, eating out, and fishing. The Court also noted that the employees weren’t required to abstain from alcohol, although “in Mr. Malone’s case, it might be advisable that he do so.”

Regarding the agreement between the parties, the Court said that while it was clear the employees didn’t like the conditions of the on-call policy, they *knew* the on-call policy, continued to work at Genpak, and participated in the on-call assignments. This demonstrated their constructive acceptance of the terms of the on-call policy. 2010 WL 5638616

**Practical Tip:** This case is significant in that employees who were on-call for large blocks of time (seven days) were not “working” and were not entitled to pay except when responding to a call. It also stands for the proposition that employees may not like the terms of their on-call status, but continued employment is acceptance of such terms. Apply the six factors considered by the court in this case when analyzing whether your on-call situations are work time.

## UPCOMING SEMINAR

**April Seminar in Grand Junction:** The Employer’s Advisory editors will present a full-day Employment Law Update seminar in Grand Junction on April 20, 2011, sponsored by the Western Colorado Human Resources Association (WCHRA). See enclosure and our website at [www.bechtelsanto.com](http://www.bechtelsanto.com) for more details. The seminar will discuss issues regarding background checks, wage-and-hour compliance, Title VII, and Employee Handbooks. Additionally, the afternoon session is designed to help you handle day-to-day employment issues created by the “difficult” employee.

## Q&A

*Q. A new mother is working for us who insists that she be allowed to express milk at work in the morning and afternoon for her nursing baby. It takes her 35 to 40 minutes each time. We are a small shop and have no private area for this purpose other than a bathroom stall, which she refuses to use. Must we allow this? Do we have to pay her for the time? Can we require that she use the bathroom stall?*

*A. In 2008, Colorado enacted the “Workplace Accommodations for Nursing Mothers” Act, (CRS 8-13.5-101) requiring that all employers provide “reasonable unpaid break time or permit an employee to use paid break time, meal time, or both, each day to allow the employee to express breast milk for her nursing child for up to two years after the child’s birth.” The law requires employers to “make reasonable efforts to provide a room or other location in close proximity to the work area, other than a toilet stall, where an employee can express breast milk in privacy.” “Reasonable efforts” means any effort that would not impose an undue hardship on the operation of the employer’s business. And “undue hardship” means any action that requires significant difficulty or expense when considered in relation to factors such as the size of the business, the financial resources of the business, or the nature and structure of its operation, including consideration of the special circumstances of public safety. Unless allowing the employee this much time away from her job duties creates a safety hazard or necessitates hiring another employee to fill in, you should allow the breaks.*

If the employee is salaried exempt, do not deduct from the salary for this time; if the employee is non-exempt, you can make the break

unpaid to the extent it exceeds a normal break. Under the FLSA, anything beyond 20 minutes at one time could be unpaid. Regarding the private facility, you could hang a curtain with a “do not disturb” sign on it in a corner if there is no private room available. Note, the FLSA was amended by the Patient Protection and Affordable Care Act to also require “reasonable” breaks for non-exempt nursing mothers to express milk for their infants.

*Q. We want to pay our field employees on a “day rate” compensation plan. The day rate will be \$280. Generally, the employees work 12 hours a day, 6 days a week. With the day rate, the employees won’t have to keep track of their work hours and we will save a lot of paperwork and headaches. Plus, the employees will know exactly what they are getting paid for each day worked. Is this legal?*

*A. No, unless the employees are exempt from the FLSA. You can pay the “day rate” but you must also keep a record of the number of hours worked each day and each week and pay overtime for hours worked in excess of 40 per workweek. If an employee works 12 hours a day, 6 days a week, that is 72 hours per week, 32 of which are overtime and must be paid at 1.5 times the regular rate per hour. The regular rate is equal to the total amount paid that week (\$280 x 6 days = \$1,680) divided by the total hours worked that week (72 hours), which in this case, is \$23.33 per hour. The additional overtime owed, on top of the day rate, for one 72-hour week will be \$373.28. This is equal to ½ of the regular rate for each overtime hour (½ x \$23.33 x 32 overtime hrs. = \$373.28). If you fail to pay this additional overtime premium, you can also be liable for a 100% penalty and have to pay the attorneys’ fees and costs incurred by the employee in pursuing a claim for overtime. 2011 WL 590349.*