LABOR & EMPLOYMENT LAW

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INTRODUCTION

This *Survey* year was highlighted by several significant state and federal legislative and regulatory developments. Specifically, the New York Labor Law was amended to provide employment rights to domestic workers, to require employers to provide certain wage information to employees, and to create a presumption that construction workers are not independent contractors. The New York Human Rights Law was also amended to protect domestic workers from sexual and other forms of harassment. Additionally, the New York State Department of Labor revised regulations regarding the New York State Worker Adjustment and Retraining Notification Act and issued a Wage Order pertaining to employees in the hotel and restaurant industry. In addition, the National Labor Relations Board issued a final rule which requires most private sector employers to post a notice informing employees of their rights under the National Labor Relations Act. Lastly, and perhaps most significantly, New York State legalized same-sex marriage.

In addition to the legislative and regulatory developments, there

were a number of significant decisions by the United States Supreme Court on various labor and employment law issues. Notably, the Supreme Court expanded the reach of Title VII's anti-retaliation provision, held that oral complaints are protected activity under the anti-retaliation provision of the Fair Labor Standards Act (FLSA), denied class certification to 1.5 million current and former female employees in a gender discrimination lawsuit, resolved a circuit split regarding the "Cat's Paw" theory of liability, and determined that a state's rule preventing parties from contractually prohibiting class-wide arbitration was preempted by the Federal Arbitration Act. The Supreme Court also held that retaliatory actions by a government employer against a government employee do not give rise to liability under the First Amendment's Petition Clause unless the employee's petition relates to a matter of public concern.

Similarly, the Second Circuit Court of Appeals handed down a few notable employment-related decisions. First, it held that temporal proximity, without other evidence of pretext, is insufficient to support a claim of unlawful retaliation under Title VII. The Second Circuit also ruled that juries, not courts, are tasked with determining whether entities are joint employers under the FLSA. Lastly, the court found that pharmaceutical sales representatives are not exempt from the overtime pay requirements under the FLSA.

The New York Court of Appeals also issued several important decisions on various employment law issues, including whether a non-resident has standing to sue its employer under the New York State and New York City Human Rights Laws. The Court of Appeals also held that the invasion of personal privacy exception to the Freedom of Information Law protected a school district from having to disclose information about its employees to a teachers' union. Finally, New York courts have continued to address various issues surrounding the employment-at-will doctrine.

I. EMPLOYMENT-AT-WILL

A. First Department Refuses to Extend Employment-At-Will Exception to Professions Other than the Practice of Law

In *Sullivan v. Harnisch*, the First Department declined to find an exception to the employment-at-will doctrine where an employee claimed that his discharge violated his former firm's Code of Ethics.[2] The plaintiff in that case, Joseph Sullivan, was the former Chief

2. 81 A.D.3d 117, 119, 915 N.Y.S.2d 514, 516 (1st Dep't 2010).

Compliance Officer (CCO) of the corporate defendants, Peconic Partners LLC and Peconic Asset Managers LLC (collectively "Peconic").[3] Peconic, which was subject to the oversight of the United States Securities and Exchange Commission (SEC), maintained a written Code of Ethics.[4] Among other things, Peconic's Code of Ethics required "the CCO, 'on pains of termination,' to 'determine' when alerted, whether an employee or member of Peconic has engaged in any Code violation."[5]

Pursuant to Peconic's Code of Ethics, Sullivan questioned William Harnisch, the President and majority owner of Peconic, regarding his belief "that Harnisch had engaged in 'front-running,' a practice specifically forbidden by Peconic's" Code of Ethics and its Compliance Manual, as well as its "Form ADV,"[6] a document filed with the SEC "outlin[ing] what controls [Peconic has] in place to ensure compliance with state and federal rules and regulations."[7] Subsequently, Sullivan's employment with Peconic was terminated.[8]

Following his termination, Sullivan filed suit against Harnisch and Peconic alleging, among other things, a claim for breach of an implied contract.[9] The trial court had found that an "express limitation" to an employer's right to terminate an at-will employee "may result from the language found both in the Peconic handbook prohibiting retaliation, and also from the Code [of Ethics] language specifically requiring the CCO to report complaints to the SEC."[10]

The First Department disagreed, finding that "nothing in either [the Code of Ethics or Form ADV] protect[ed] the CCO from being terminated, even though the Code [of Ethics] authorized Sullivan to make his complaint to the SEC."[11] As the First Department explained, "courts should not 'infer a contractual limitation on the employer's right to terminate an at-will employ[ee] absent an express agreement to that effect which is relied upon by the employee.'"[12]

3. *Id.*

4. *Id.*

5. *Id.* (citation omitted).

6. *Id.* at 119, 120, 915 N.Y.S.2d at 516, 517.

7. *Sullivan*, 81 A.D.3d at 119, 915 N.Y.S.2d at 516.

8. *Id.* at 121, 915 N.Y.S.2d at 517.

9. *Id.*

10. *Id.* at 121-22, 915 N.Y.S.2d at 517-18. As the First Department noted, "Sullivan [did] not allege that he made any complaint to the SEC or any other government agency." *Id.* at 121, 915 N.Y.S.2d at 517.

11. *Sullivan*, 81 A.D.3d at 122, 915 N.Y.S.2d at 518.

12. *Id.* (quoting Chazen v. Person/Wolisky, Inc., 309 A.D.2d 889, 890, 766 N.Y.S.2d 360, 360 (2d Dep't 2003)).

To be certain, an exception to the employment-at-will doctrine has been found by the Court of Appeals in *Wieder v. Skala*.[13] In that case, "an associate at a law firm claimed [he was] discharged for insisting [his] firm report [the] unethical conduct of another associate . . . ."[14] The Court found that he had stated a valid claim for breach of contract, reasoning that "intrinsic to the relationship between Wieder and the law firm was an unstated but essential compact that in conducting the firm's legal practice, both Wieder and the firm would do so in compliance with the prevailing rules of conduct and ethical standards of the legal profession."[15] According to the Court, "the [law] firm's insistence that [the] associate . . . act unethically and in violation of [the] Code of Professional Responsibility . . . amounted to nothing less than a frustration of the only legitimate purpose of the employment relationship . . . ."[16]

However, as noted by both the defendants in this instant case and the First Department, "*Wieder* has not been applied to a business or profession other than the practice of law."[17] Accordingly, the First Department was compelled to dismiss Sullivan's breach of implied contract cause of action because, "[n]otwithstanding his employment responsibilities, and the conflict posed, he did not have either an express or implied right to continued employment."[18] The First Department further noted that, "[w]hile some may disagree, absent extension of the *Wieder* exception by the Court of Appeals, or action by the Legislature, the existing precedent mandates this result."[19]

B. Employer Cannot State Fraudulent Inducement or Breach of Fiduciary Claim Against Former At-Will Employee

In *Frank Crystal & Co. v. Dillmann*, the First Department held that an employer (Frank Crystal & Co.) could state a claim for fraudulent inducement of a contract or breach of fiduciary duty against a former at-will employee (Dillmann) based on her failure to disclose that she had a

13. *Id.* (quoting Wieder v. Skala, 80 N.Y.2d 628, 633, 609 N.E.2d 105, 107, 593 N.Y.S.2d 752, 754 (1992)).

14. *Id.* at 123, 915 N.Y.S.2d at 519.

15. *Id.*

16. *Sullivan*, 81 A.D.3d at 123, 915 N.Y.S.2d at 519.

17. *Id.* at 124, 915 N.Y.S.2d at 519.

18. *Id.* at 124, 125, 915 N.Y.S.2d at 520 (while the First Department held that the trial court did not err in refusing to dismiss the plaintiff's claims for fraud, conspiracy to defraud, and breach of fiduciary duty, the court cautioned that these claims only remained viable to the extent that they arose from something other than a claim for wrongful discharge).

19. *Id.* at 124, 915 N.Y.S.2d at 520.

non-compete agreement with her previous employer.[20] As the First Department explained, "[t]o maintain a cause of action for fraudulent inducement of [a] contract, [Frank Crystal had to] show 'a material representation, known to be false, made [by Dillmann] with the intention of inducing reliance, upon which [Frank Crystal & Co.] actually relie[d], consequentially sustaining a detriment.'"[21] The court found that Frank Crystal failed to "satisfy the requirement of demonstrating detrimental reliance [because it] expressly retained Dillmann as an at-will employee with an unfettered right to terminate her employment at any time."[22] Furthermore, the court found that the breach of fiduciary duty claim also failed because "Dillmann, as an at-will employee, had no duty to remain employed by [Frank Crystal & Co.], even if she was a key player in ongoing client proposals."[23]

II. NEW YORK LEGISLATIVE AND REGULATORY DEVELOPMENTS

A. State Laws Amended to Provide Rights to Domestic Workers

On August 31, 2010, Governor Paterson signed the Domestic Workers Bill of Rights.[24] This law took effect on November 29, 2010 and provides domestic workers with certain employment rights.[25]

Under this law, a "domestic worker" is defined as "a person employed in a home or residence for the purpose of caring for a child, serving as a companion for a sick, convalescing or elderly person, housekeeping, or for any other domestic service purpose."[26] The term "domestic worker" does not include: (1) persons "working on a casual basis"[;] (2) persons who are providing "companionship services" and are "employed by an employer or agency other than the family or household using his or her services"[;] or (3) persons who are "relative[s] through blood, marriage or adoption of: [(a)] the employer or [(b)] the person for whom the worker is delivering services under a program funded or administered by federal, state or local government."[27]

Under the Domestic Workers Bill of Rights, domestic workers are

20. 84 A.D.3d 704, 704, 706, 925 N.Y.S.2d 430, 431, 432 (1st Dep't 2011).

21. *Id.* at 704, 925 N.Y.S.2d at 431 (quoting Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Wise Metals Grp. LLC, 19 A.D.3d 273, 275, 798 N.Y.S.2d 14, 16 (1st Dep't 2005)).

22. *Id.* at 704-05, 925 N.Y.S.2d at 431.

23. *Id.* at 706, 925 N.Y.S.2d at 432.

24. *See generally* Act of August 31, 2010, ch. 481, 2010 N.Y. Laws 1315.

25. *See id.* at 1315, 1318.

26. N.Y. LAB. LAW § 2(16) (McKinney Supp. 2012).

27. *Id.*

entitled to overtime pay at time and a half their normal wage rate when they work over forty hours in a week (or forty-four hours in a week for domestic workers who reside in their employer's home), one day of rest each week (or overtime pay if rest is waived), and three paid days of rest annually after working for the same employer for one year.[28] Additionally, the law also amends the New York Workers' Compensation Law to provide statutory disability benefits to domestic workers[29] and amends the New York Executive Law to protect domestic workers from sexual and other forms of harassment.[30]

B. New York Enacts Construction Industry Fair Play Act

On October 26, 2010, the New York State Construction Industry Fair Play Act (the "Act") went into effect.[31] Under the law, a construction worker is presumed to be an employee, rather than an independent contractor unless the worker is: (1) a separate business entity as defined by the law, or (2) the worker "is free from control and direction in performing the job, both under . . . contract and in fact;" performing services "outside [of] the usual course of business" for the company; and "engaged in an independently established trade, occupation, . . . or business that is similar to the service" they perform.[32]

Any employer who willfully violates the Act by failing to properly classify its employees is subject to civil penalties of up to $2500 per misclassified employee for a first violation and up to $5000 for a second violation within a five-year period.[33] In addition, employers may also be subject to criminal prosecution for a misdemeanor and subject to imprisonment for up to thirty days or a fine up to $25,000 for the first offense, or imprisonment for up to sixty days or a fine up to $50,000 for a subsequent offense.[34] The law also imposes personal liability on corporate officers and certain shareholders for the fines and penalties under the Act where they knowingly permit the violations to occur.[35]

In addition to classification penalties, the law also imposes a notice posting requirement for all construction industry employers.[36] Failure

28. *Id.* § 170.

29. 2010 N.Y. Laws at 1317 (codified at N.Y. WORKERS' COMP. LAW § 201).

30. 2010 N.Y. Laws at 1315-16 (codified at N.Y. EXEC. LAW § 296-b (McKinney Supp. 2012)).

31. *See* N.Y. LAB. LAW § 861-861-f.

32. *Id.* § 861-c(1).

33. *Id.* § 861-e(3).

34. *Id.* § 861-e(4).

35. *Id.* § 861-e(5).

36. N.Y. LAB. LAW § 861-d(1).

to post the required notice can result in penalties of up to $1500 for a first offense and up to $5000 for a second offense.[37]

C. New York Labor Law Amended by the Wage Theft Prevention Act

The Wage Theft Prevention Act (WTPA), which went into effect on April 9, 2011, amends various sections of the New York Labor Law to, among other things: require employers to provide additional information to employees related to wages; enhance penalties for employers who underpay employees; expand the scope of New York's wage statute's retaliation provision; and increase employers' recordkeeping obligations.[38]

First, New York employers are now required to provide all employees with written pay notices, both at the time of hire and on or before February 1st of each subsequent year.[39] These notices must include: (1) the employee's rate or rates of pay, including overtime pay if applicable; (2) how the employee is paid (e.g., by the hour, shift, day, week, commission, etc.); (3) the employee's regular payday; (4) the official name of the employer and any other names used for business; (5) the address and phone number of the employer's main office or principal location; and (6) any allowances taken as part of the minimum wage (e.g., tip, meal, and lodging credits).[40] Employers must also provide written notice to employees at least seven days prior to any changes to the information contained in the wage notice.[41] Each of the written notices must be provided in English, and, if applicable, the primary language of the employee.[42] Employers are required to have employees sign and date an acknowledgment each time a wage notice is provided.[43] Employers who fail to provide these written notices may be subject to liability in a civil action of fifty dollars for each work week

37. *Id.* § 861-d(3).

38. *See generally* Wage Theft Prevention Act, ch. 564, 2010 N.Y. Laws 1715 (codified at N.Y. LAB. LAW §§ 2, 195, 196, 196-a, 197, 198, 198-a, 199-a, 215, 218, 219, 219-c, 661, 662, 663).

39. N.Y. LAB. LAW § 195(1)(a).

40. *Id.*

41. *Id.* § 195(2)). Employers need not provide this notice if such changes are reflected in the wage statement that employers are required to provide with each paycheck as described *infra*.

42. *Id.* § 195(1)(a). If the New York Department of Labor has not provided a notice template in the employee's primary language, an employer complies with this requirement by providing the notice in English only. *Id.* § 195(1)(c).

43. N.Y. LAB. LAW § 195(1)(a). The WTPA additionally requires that in the written acknowledgment, employees affirm that they have identified their primary language to the employer and the employer provided the notice in such language. *Id.*

the violations occurred, together with costs and attorney's fees.[44] Such actions may be brought by either the employee or the Commissioner of Labor ("Commissioner").[45]

With respect to weekly wage statements, the WTPA requires employers to provide the following additional information to employees with every payment of wages:[46] the dates covered by the payment; the employee's name; the employer's name, address, and telephone number; the employee's wage rate and basis thereof (e.g., hour, shift, day, week, salary, piece, commission); allowances claimed as part of the minimum wage; gross deductions; and net wages paid.[47] Employers who fail to provide compliant wage statements may have to pay damages of up to one hundred dollars per week, per employee, together with costs and attorneys' fees.[48] Copies of the aforementioned records, including the employee acknowledgments, must now be maintained by employers for a minimum of six years.[49]

The WTPA also increases the civil and criminal penalties against employers that violate New York's wage payment laws and enhances the New York State Department of Labor's administrative powers to enforce such violations.[50] With respect to civil lawsuits by employees for wage payment violations, the WTPA increases the penalty from twenty-five percent of the total underpayment of wages to one hundred percent of underpayment, unless the employer can prove a good faith basis for believing its underpayment was in compliance with legal requirements.[51] To enforce these provisions, the WTPA also gives the Commissioner the authority to asses up to one hundred percent

44. *Id.* § 198(1-b). An employee may recover up to a maximum of $2500 and the Commissioner, likewise, may recover fifty dollars per work week per employee, but there is no cap on damages in an action by the Commissioner. *Id.* An employer can avoid liability if it demonstrates that it either paid all wages legally required, or had a good faith reasonable basis for not providing notice. *Id.*

45. N.Y. LAB. LAW § 198(1-b).

46. *Id.* § 195(3). Many of these notice requirements were previously set forth in the New York Department of Labor (NYDOL) regulations.

47. *Id.* Employers must also provide non-exempt employees with: the employee's regular hourly rate of pay, the employee's overtime rate of pay, "the number of regular hours worked, and the number of overtime hours worked." *Id.*

48. *Id.* § 198(1-d). In civil actions by employees, this penalty is capped at $2500 per employee, while there is no similar cap in actions by the Commissioner. N.Y. LAB. LAW § 198(1-d). Again, an employer can avoid liability if it demonstrates that it had a good faith reasonable basis for not providing notice. *Id.*

49. *Id.* § 195(1)(a).

50. Wage Theft Prevention Act, ch. 564, 2010 N.Y. Laws 1716-20, 1722-26 (codified at N.Y. LAB. LAW §§ 196, 197, 198, 198-a, 218(1), 218(3), 219, 662, 663).

51. 2010 N.Y. Laws at 1716-20, 1725-26 (codified at N.Y. LAB. LAW §§ 196, 198, 663).

liquidated damages for willful violations, and the Commissioner may now bring any legal action necessary, including an administrative action, to collect on claims.[52] While the WTPA does not expand the criminal penalties available for wage payment violations, it does expand the range of covered employers to include partnerships and LLCs.[53]

The WTPA also expands the anti-retaliation provision under section 215 of the New York Labor Law, gives the Commissioner of Labor more power to enforce the law, and enhances the criminal and civil penalties available for employees who make complaints regarding conduct the employee reasonably, and in good faith, believes is in violation of the wage payment laws.[54] The WTPA also adds a tolling provision whereby the statute of limitations for wage suits is tolled whenever an employee files a complaint with the New York State Department of Labor or an investigation is commenced by the New York State Department of Labor, whichever is earlier.[55] Additionally, the WTPA empowers the Commissioner to require employers to post a summary of employee wage violations in the workplace. [56] Willful violators may be required to affix violations in an area visible to the general public.[57]

D. Department of Labor Issues Hospitality Industry Wage Order

In January 2011, the New York State Department of Labor implemented a new Wage Order pertaining to employees in the restaurant and hotel industries.[58] This Hospitality Industry Wage Order was effective on January 1, 2011, although the New York State Department of Labor gave employers until March 1, 2011 (or the next regularly scheduled payday after March 1st) to make the necessary changes to bring their systems into compliance.[59] By that time, employers were required to pay employees any additional wages earned as a result of these new rules computed retroactively to January 1,

52. N.Y. LAB. LAW §§ 196, 198, 663.

53. 2010 N.Y. Laws at 1720, 1724-25 (codified at N.Y. LAB. LAW §§ 198-a, 662) (previously, criminal sanctions applied only to corporations and their officers and agents).

54. *Id*. at 1721-22 (codified at N.Y. LAB. LAW § 215).

55. *Id*. at 1718-20, 1725-26 (codified at N.Y. LAB. LAW §§ 198, 663).

56. N.Y. LAB. LAW § 219-c.

57. *Id.*

58. *See generally* N.Y. COMP. CODES R. & REGS. tit. 12, § 146 (2010).

59. *Summary of Minimum Wage Changes Contained in the New Part 146 Covering the Restaurant and Hotel Industries Now Combined in the Hospitality Wage Order*, N.Y. ST. DEP'T OF LAB., http://www.labor.ny.gov/legal/laws/pdf/hospitality-wage-order/summary-of-hospitality-wage-order.pdf (last visited Mar. 21, 2012).

2011.[60]

Under this Wage Order, the minimum wage requirements for tipped employees (such as food service workers, chambermaids in resort hotels, and other types of service workers) were increased and/or simplified, and gratuities are now subject to strict regulation.[61] The Order requires, among other things, that all hospitality employees are paid an hourly rate (except for exempt employees and commissioned sales persons) and that all non-exempt, non-residential, and residential employees are given overtime pay after working forty hours in a week.[62] The Wage Order also mandates that all non-exempt employees be given spread of hours pay, call-in pay, and uniform maintenance pay, regardless of their pay rate, but exempts employers from paying uniform maintenance pay to certain workers who have wash and wear uniforms.[63] Additionally, under the Wage Order, employers are required to allow employees to bring their own food to consume on the employer's premises or give them a meal (at a cost no greater than the meal credit amount) whenever their shift is long enough to entitle them to a meal period.[64] Furthermore, the meal credit an employer may take for providing employees meals has been increased to $2.50.[65]

E. New York State Department of Labor Issues Revised WARN Regulations

In July 2010, the New York State Department of Labor revised, for the second time, its regulations[66] implementing the New York State Worker Adjustment and Retraining Notification Act (the "New York WARN Act"), the state statute which requires covered employers to provide ninety days notice to their employees, their employees' unions, and to government agencies before taking certain actions which will result in employment losses.[67] The revised emergency regulations replaced and superseded the existing regulations and were effective immediately.

60. *Id.*

61. 12 N.Y.C.R.R. 146-1.2, 146-1.3, 146-2.16, 146-2.19, 146-2.20; *see also Hospitality Wage Order*, N.Y. ST. DEP'T OF LAB., http://www.labor.ny.gov/legal/hospitality-industry-wage-order.shtm (last visited Mar. 21, 2012).

62. 12 N.Y.C.R.R. 146-1.4, 146-2.5; *see also Summary of Minimum Wage Changes*, *supra* note 59.

63. 12 N.Y.C.R.R. 146-1.5-146-1.7.

64. *Id.* § 146-2.8(c).

65. *Id.* § 146-1.9.

66. *Id.* part 921.

67. N.Y. LAB. LAW § 860-b(1) (McKinney Supp. 2012).

The new regulations add that the term "affected employee" does not include an officer, director, or shareholder.[68] Previously, the regulation had only excluded from that definition a "business partner, or a consultant or contract employee who has a separate employment relationship with another employer and is paid by that employer or who is self-employed."[69]

The revised regulations also impact coverage determinations by specifying that determinations as to whether an employer meets the fifty-employee threshold will be made as of "the date the first notice [would be] required to be given" under the New York WARN Act.[70] The regulations also provide that when an employer relies on one of the statutory defenses[71] (such as a natural disaster or unforeseen business circumstances) as a justification for not providing ninety days notice, it must provide documentation to support the application of the claimed exception.[72]

Finally, and perhaps most importantly, the revised regulations now require that covered employers comply with the New York WARN Act's notice requirements when rescinding a previously issued notice of "a plant closing, mass layoff, relocation, or covered reduction in . . . hours."[73] The regulations require that the rescission notice be given "as soon as possible" after making the determination using the same notice process as the original notice.[74] Additionally, the rescission notice must include a reference to the earlier notice and the reason why the action is no longer required.[75]

F. New York Legalizes Same-Sex Marriage

On June 24, 2011, Governor Cuomo signed the Marriage Equality Act, which legalizes same-sex marriage, effective immediately.[76] The law provides that no application for a marriage license in New York State shall be denied on the ground that the parties are of the same sex.[77] Accordingly, "[a] marriage that is otherwise valid [will] be valid

68. 12 N.Y.C.R.R. 921-1.1(a).

69. *Id.* § 921-1.1(a).

70. *Id.* § 921-1.1(e)(7)(iii).

71. *Id.* § 921-6.2-921-6.5.

72. *Id.* § 921-6.1.

73. 12 N.Y.C.R.R. 921-3.2.

74. *Id.*

75. *Id.*

76. Alan D. Scheinkman, *Practice Commentary*, N.Y. DOM. REL. LAW § 10-a, at 15 (McKinney Supp. 2012).

77. N.Y. DOM. REL. LAW § 10-a(2).

regardless of whether the parties to the marriage are of the same or different sex."[78] Furthermore, "[n]o government treatment or legal status, effect, right, benefit, privilege, protection[,] or responsibility relating to marriage" in New York will "differ based on the parties to the marriage being . . . of the same sex rather than a different sex."[79]

The preamble to the Act expresses the legislative intent that "[m]arriage is a fundamental human right," and that "[s]ame-sex couples should have the same access as others to the protections, responsibilities, rights, obligations, and benefits of civil marriage."[80] The preamble further notes that "[s]table family relationships help build a stronger society."[81]

Notably, the Act provides an exception for religious entities.[82] Specifically, the law provides that a religious corporation incorporated under the Education Law or the Religious Corporations Law "shall not be required to provide . . . accommodations, advantages, facilities . . . privileges [related to] the solemnization or celebration of a [same-sex] marriage."[83] Additionally, the Act states that "no clergyman or minister . . . shall be required to solemnize any [same-sex] marriage."[84]

III. EMPLOYMENT DISCRIMINATION

A. U.S. Supreme Court Expands Reach of Title VII Retaliation Provision

In *Thompson v. North American Stainless, LP*, a unanimous Supreme Court held that third-party retaliation can violate Title VII.[85] Specifically, the Court found that an employer engaged in unlawful retaliation in violation of Title VII when it discharged an employee's fiancée because the employee filed a discrimination charge with the Equal Employment Opportunity Commission (EEOC).[86]

In this case, both Thompson and his fiancée, Regalado, were employees of North American Stainless (NAS).[87] "In February 2003, the [EEOC] notified NAS that Regalado filed a charge [with the EEOC]

78. *Id.* § 10-a(1).
79. *Id.* § 10-a(2).
80. *Id.* § 10-a, *Historical and Statutory Notes*, at 15.
81. *Id.*
82. N.Y. DOM. REL. LAW § 10-b.
83. *Id.* § 10-b(1).
84. *Id.* § 11(1).
85. 131 S. Ct. 863, 870 (2011).
86. *Id.* at 867, 870.
87. *Id.* at 867.

alleging sex discrimination."[88] NAS fired Thompson three weeks later.[89] Thompson filed suit against NAS "claiming that NAS . . . fired him . . . to retaliate against Regalado for filing her charge with the EEOC."[90]

The Title VII anti-retaliation provision provides that "'[i]t shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has made a charge' under Title VII."[91] The Supreme Court first noted that this "antiretaliation provision must be construed to cover a broad range of employer conduct" and that "it prohibits any employer action that 'well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.'"[92] The Court then found "that a reasonable worker might be dissuaded from engaging in protected activity if she knew that [her fiancée's employment might be terminated]."[93]

The Court also held that Thompson had standing to sue NAS under Title VII because he "[fell] within the zone of interests protected by Title VII" and could be considered "the person claiming to be aggrieved."[94] In its decision, the Court declined to adopt "a categorical rule that third-party reprisals do not violate Title VII."[95] It also refused to identify "a fixed class of relationships for which third-party reprisals are unlawful."[96] However, it noted that "firing a close family member will almost always meet [the standard] and inflicting a milder reprisal on a mere acquaintance will almost never do so . . . ."[97]

B. U.S. Supreme Court Resolves Circuit Split Regarding "Cat's Paw" Theory of Liability

In *Staub v. Proctor Hospital*, the U.S. Supreme Court resolved a split in the various U.S. Circuit Courts of Appeals regarding the so-called "cat's paw" theory of discrimination, a theory of liability by which the discriminatory animus of another may be attributed to the

88. *Id.*
89. *Id.*
90. *Thompson*, 131 S. Ct. at 867.
91. *Id.* (quoting 42 U.S.C. § 2000e-3(a) (2006)).
92. *Id.* at 868 (quoting Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 77 (2006)).
93. *Id.*
94. *Id.* at 869, 870 (internal quotation marks omitted) (internal citation omitted).
95. *Thompson*, 131 S. Ct. at 868.
96. *Id.*
97. *Id.*

ultimate decision maker.[98] In that case, Staub, a member of the U.S. Army Reserve, sued his former employer, arguing that his termination was in violation of the Uniformed Services Employment and Reemployment Rights Act (USERRA).[99] In support of his claim Staub argued that, even though the ultimate decision maker was not biased, his decision was influenced by the actions of Staub's immediate supervisors, who were hostile to his military obligations.[100]

A jury found the employer liable and awarded damages to Staub, but the Seventh Circuit Court of Appeals reversed finding that the employer was entitled to summary judgment dismissing the case because the ultimate decision maker was not wholly dependent upon the advice of the plaintiff's immediate supervisors.[101] "[U]nder Seventh Circuit precedent, a 'cat's paw' case could not succeed unless the non-decisionmaker exercised such 'singular influence' over the decisionmaker [so] that the decision to terminate [could be characterized as one] of 'blind reliance.'" [102]

The U.S. Supreme Court reversed and held that "if a supervisor performs an act motivated by antimilitary animus that is *intended* by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable under USERRA."[103] The Court rejected the contention that the exercise of independent judgment on the part of the ultimate decision maker automatically breaks the causal link from the supervisor's bias to the adverse employment action.[104] The Court also declined to adopt a "hard-and-fast rule" that the decision maker's independent investigation negates that effect of the prior discrimination.[105] The Court went on to explain that:

> if the employer's investigation results in an adverse action for reasons unrelated to the supervisor's original biased action . . . then the employer will not be liable. But the supervisor's biased report may remain a causal factor if the independent investigation takes it into account without determining that the adverse action was, apart from

98. 131 S. Ct. 1186 (2011).

99. *Id.* at 1189, 1190; *see also* 38 U.S.C. §§ 4301-4334 (2006).

100. *Staub*, 131 S. Ct. at 1190.

101. *Id.*

102. *Id.* (quoting Staub v. Proctor Hosp., 560 F.3d 647, 659 (7th Cir. 2009)).

103. *Id.* at 1194. Earlier in its decision, the Court remarked on the similarity between the relevant portions of USERRA and Title VII. *Id.* at 1190-91 (citing 42 U.S.C. §§ 2000e-2(a), (m) (2006)).

104. *Staub*, 131 S. Ct. at 1192.

105. *Id.* at 1193.

> the supervisor's recommendation, entirely justified.[106]

Accordingly, the Court remanded to the Seventh Circuit for a determination on whether the jury verdict should be reinstated or if a new trial was required.[107]

C. U.S. Supreme Court Denies Class Certification to 1.5 Million Female Employees

On June 20, 2011, the United States Supreme Court denied class certification to an estimated 1.5 million former and current female employees of the nation's largest private employer, Wal-Mart Stores, Inc.[108] The named plaintiffs in that case claimed that Wal-Mart discriminated against them and other female employees on the basis of their sex by denying them equal pay and/or promotions in violation of Title VII.[109] The Court, however, held that the proposed class could not be certified because the action did not satisfy the commonality requirement of Rule 23 of the Federal Rules of Civil Procedure.[110] In so holding, the Court remarked that:

> [h]ere respondents wish to sue about literally millions of employment decisions at once. Without some glue holding the alleged *reasons* for all those decisions together, it will be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question *why was I disfavored*.[111]

At the outset, the Court explained that while the commonality standard of Rule 23 requires a showing that "the class members 'have suffered the same injury,'" this requirement is not met by merely alleging that all "employees of the same company . . . have suffered a Title VII injury."[112] Instead, the plaintiffs had the burden of showing "'significant proof' that Wal-Mart 'operated under a general policy of discrimination.'"[113] The Court found that such evidence was "entirely absent" in the case at hand.[114]

Wal-Mart's policy regarding pay and promotions generally left such decisions to the "local managers' broad discretion, which is

106. *Id.*

107. *Id.* at 1194-95.

108. Wal-Mart Stores, Inc. v. Dukes, 131 S.Ct. 2541, 2547, 2557 (2011).

109. *Id.* at 2547.

110. *Id.* at 2556-57.

111. *Id.* at 2552.

112. *Id.* at 2551 (quoting Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 157 (1982)).

113. *Wal-Mart Stores, Inc.*, 131 S. Ct. at 2553.

114. *Id.*

exercised 'in a largely subjective manner'" with very little oversight from upper management.[115] Such a policy, according to the Court, "is just the opposite of a uniform employment practice that would provide the commonality needed for a class action; it is a policy *against having* uniform employment practices."[116] The Court acknowledged that providing discretion to lower level supervisors *can* be the basis of Title VII disparate impact liability; however, "recognition that this type of Title VII claim 'can' exist does not lead to the conclusion that every employee in a company using a system of discretion has such a claim in common."[117] In other words, the Court found that "[i]n a company of Wal-Mart's size and geographical scope, it is quite unbelievable that all managers would exercise their discretion in a common way without some common direction."[118] Because the plaintiffs had set forth no such evidence tying all 1.5 million claims together, the Court found that they could not proceed with their claims as a class.[119]

D. Second Circuit Rules Temporal Proximity Alone Insufficient to Support Claim of Retaliation

In *El Sayed v. Hilton Hotels Corp.*, the Second Circuit held, in a per curiam opinion, that temporal proximity, without other evidence of pretext, is insufficient to support a claim of unlawful retaliation under Title VII.[120] In that case, the plaintiff—a United States citizen of Egyptian descent and a Muslim—was terminated just three weeks after making a complaint to Hilton's Housekeeping Director that a co-worker had referred to him as a "Terrorist Muslim Taliban."[121]

The Second Circuit found that evidence of such temporal proximity between the protected conduct (the complaint) and the adverse employment action (his discharge), was sufficient to establish a prima facie case of retaliation under the familiar *McDonnell Douglas*

115. *Id*. at 2547 (quoting Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137, 145 (N.D. Cal. 2004)).

116. *Id.* at 2554. In fact, the Court remarked that this was "a very common and presumptively reasonable way of doing business—one that we have said 'should itself raise no inference of discriminatory conduct.'" *Id.* (quoting Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 990 (1988)).

117. *Wal-Mart Stores, Inc.*, 131 S. Ct. at 2554.

118. *Id*. at 2555.

119. *Id.* at 2554-56, 2556-57 (finding insufficient the plaintiffs' statistical evidence regarding pay and promotions, anecdotal accounts of discrimination by a fraction of the class members, and testimony from a sociologist about the impact of Wal-Mart's corporate culture).

120. 627 F.3d 931, 933 (2d Cir. 2010).

121. *Id*. at 932.

burden-shifting framework.[122] However, a prima facie case only establishes a rebuttable presumption, and the defendant had articulated a "legitimate non-retaliatory" rationale for the plaintiff's termination.[123] Specifically, according to Hilton Hotels, the plaintiff was terminated because he had omitted prior employment history from his employment application—an offense constituting grounds for dismissal under its employment policies.[124] The misrepresentation was only recently discovered, and, after the plaintiff admitted to the omission, he was terminated "later that month."[125]

Accordingly, the burden shifted back to the plaintiff to come forward with some evidence that his discharge was pretextual.[126] This, the Second Circuit held, the plaintiff failed to do.[127] He produced no other evidence, beside the temporal proximity, in support of his claim of retaliation, and he did not dispute that he had omitted certain information from his employment application or that such an omission was grounds for termination under Hilton's policy.[128] Therefore, the Second Circuit affirmed the grant of summary judgment in favor of the former employer, explaining that "[t]he temporal proximity of events may give rise to an inference of retaliation for the purposes of establishing a prima facie case of retaliation under Title VII, but without more, such temporal proximity is insufficient to satisfy [the] burden to bring forward some evidence of pretext."[129]

E. EEOC's Title VII Retaliation Claim Dismissed for Failure to Conciliate

In *Equal Employment Opportunity Commission v. Bloomberg, L.P.*, the United States District Court for the Southern District of New York dismissed a Title VII retaliation claim brought by the EEOC against Bloomberg because the EEOC failed to make a good faith effort to conciliate prior to bringing suit.[130] In this case, the EEOC filed suit against Bloomberg after several current and former employees filed charges with the EEOC alleging Bloomberg "discriminated and/or retaliated against [them] after they . . . announced their pregnancies

122. *Id*. (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-803 (1973)).
123. *Id.*
124. *Id.*
125. *El Sayed*, 627 F.3d at 932.
126. *Id*. at 932-33.
127. *Id*. at 933.
128. *Id.*
129. *Id.*
130. 751 F. Supp. 2d 628, 643 (S.D.N.Y. 2010).

and . . . returned to work following maternity leave."[131]

Bloomberg moved for summary judgment on the EEOC's claims alleging that the EEOC failed to conciliate both the discrimination and retaliation claims prior to bringing suit.[132] The Court noted that although Congress has authorized the EEOC to bring suit, "the EEOC must make a good faith effort to conciliate before bringing suit."[133] The Court then stated that "[t]he EEOC fulfills this [conciliation] mandate if it '(1) outlines to the employer the reasonable cause for its belief that the employer is in violation . . . (2) offers an opportunity for voluntary compliance, and (3) responds in a reasonable and flexible manner to the reasonable attitude of the employer.'"[134]

With respect to the retaliation claim, the EEOC began its conciliation efforts by sending Letters of Determination "invit[ing] Bloomberg to join in 'an effort toward a just resolution . . . .'"[135] "The EEOC [then] formally initiated conciliation [discussions] by sending Bloomberg a proposed conciliation agreement" which requested monetary and injunctive relief.[136] Bloomberg responded to this letter asking for additional time to conduct an internal investigation regarding the merits of the claim, but noted "that it 'look[ed] forward to working with [the EEOC] to achieve a resolution.'"[137] Bloomberg's letter also asked for additional information about the EEOC's determination.[138] A month later, Bloomberg sent the EEOC a written counterproposal, noting that "'[m]any of the proposals contained' in the EEOC's proposed agreement are 'acceptable to Bloomberg' but sought 'further discussion' on others."[139] The letter also stated that "Bloomberg was 'not in a position' to offer monetary relief to . . . individual claimants" or to create a class fund, but sought further discussion and was awaiting the information it previously requested.[140]

The EEOC sent a letter to Bloomberg three days later claiming that the information Bloomberg requested was unnecessary and protected by

131. *Id.* at 630.

132. *Id.* at 631.

133. *Id.* at 631, 637.

134. *Id.* at 637 (quoting Equal Emp't Opportunity Comm'n v. Johnson & Higgins, Inc., 91 F.3d 1529, 1534 (2d Cir. 1996)).

135. *Bloomberg, L.P.*, 751 F. Supp. 2d at 640.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Bloomberg, L.P.*, 751 F. Supp. 2d at 640.

the deliberative process privilege.[141] The EEOC also noted that it would only engage in discussions about Bloomberg's counterproposals if Bloomberg responded to the EEOC's monetary proposals.[142] The parties then engaged in a five-month letter-writing campaign, during which neither side would retreat from its position (the EEOC would not respond to Bloomberg's counterproposals unless Bloomberg was willing to make a reasonable monetary offer, and Bloomberg would not make a monetary offer until it received more information from the EEOC).[143] The parties did meet in person on one occasion to discuss conciliation, but continued to adhere to their respective positions.[144] Ultimately, the EEOC sent Bloomberg a letter declaring that its conciliation efforts were unsuccessful and filed suit.[145]

The district court concluded that the EEOC did not make a sincere effort to conciliate.[146] Instead, the EEOC's approach was to use "the proposed conciliation agreement as a 'weapon to force settlement.'"[147] The district court noted that the EEOC's position was inflexible and presented a "take-it-or-leave-it demand."[148] The district court reasoned that in complex cases, like the instant case, "when [an] employer reasonably asks for information to formulate a monetary [offer]," the EEOC could not "make substantial monetary demands and require employers simply to pony up or face a lawsuit."[149] Accordingly, the district court granted Bloomberg's motion to dismiss the retaliation claim.[150]

F. Court of Appeals Limits Non-Residents' Ability to Sue Employer under New York State and New York City Human Rights Laws

In *Hoffman v. Parade Publications*, the Court held that a non-resident cannot sue his employer under the New York State or New York City Human Rights Laws unless he can demonstrate that the employer's alleged discriminatory conduct had an impact within the

141. *Id.*

142. *Id.*

143. *Id.* at 640-41.

144. *Id.* at 641.

145. *Bloomberg, L.P.*, 751 F. Supp. 2d at 641.

146. *Id.* at 642.

147. *Id.* (quoting Equal Emp't Opportunity Comm'n v. Agro Distrib., LLC, 555 F.3d 462, 468 (5th Cir. 2009)).

148. *Id.* (quoting *Agro Distrib., LLC*, 555 F.3d at 468).

149. *Id.*

150. *Bloomberg, L.P.*, 751 F. Supp. 2d at 643. The court analyzed Bloomberg's motion to dismiss the discrimination claim separately and could not conclude that the EEOC failed to make a good faith effort at conciliation with respect to that claim. *Id.* at 640.

state.[151]

In this case, Hoffman, a resident of Georgia, worked for Parade Publications ("Parade") as managing director of its Newspaper Relations Group based in Atlanta.[152] His job duties consisted of developing and overseeing accounts in ten states.[153] Hoffman did not service accounts in New York.[154] In October 2007, the President of Parade called Hoffman from the Company's New York City headquarters to advise Hoffman that the Atlanta office was closing and that he would be terminated.[155] Hoffman subsequently commenced an age discrimination lawsuit against Parade alleging that his termination violated the New York City and New York State Human Rights Laws.[156] Parade moved to dismiss the complaint for lack of subject matter jurisdiction arguing that neither the New York State nor New York City Human Rights Law applied to a plaintiff who did not reside in New York.[157]

The trial court dismissed the complaint for lack of subject matter jurisdiction.[158] It found that "neither the City nor [the] State Human Rights Law applied to a plaintiff who does not reside in New York because the 'impact' of defendants' alleged discriminatory conduct was not felt within those boundaries."[159] The appellate division reversed, holding that a plaintiff only has to establish that the discriminatory decision was made in New York.[160]

The New York Court of Appeals reversed the appellate division.[161] The New York Court of Appeals first analyzed the New York City Human Rights Law and noted that its statutory language afforded protection only "to those who inhabit or are 'persons in' the City of New York."[162] The law further made reference to "inhabitants" and explained that the City Commission on Human Rights was created to "foster mutual understanding and respect among all persons *in the city*

151. 15 N.Y.3d 285, 289, 933 N.E.2d 744, 746, 907 N.Y.S.2d 145, 147 (2010).
152. *Id.* at 288, 933 N.E.2d at 745, 907 N.Y.S.2d at 146.
153. *Id.*
154. *Id.*
155. *Id.*
156. *Hoffman*, 15 N.Y.3d at 288, 93 N.E.2d at 745, 907 N.Y.S.2d at 146.
157. *Id.*
158. *Id.* at 289, 933 N.E.2d at 745, 907 N.Y.S.2d at 146.
159. *Id.*
160. *Id.*, 933 N.E.2d at 745-46, 907 N.Y.S.2d at 146-47.
161. *Hoffman*, 15 N.Y.3d at 289, 933 N.E.2d at 746, 907 N.Y.S.2d at 147.
162. *Id.*

of New York."[163] Similarly, the New York Court of Appeals found that the intent of the New York State Human Rights Law "is to protect 'inhabitants' and persons 'within' the state."[164] Accordingly, the New York Court of Appeals determined that "a nonresident must plead and prove that the alleged discriminatory conduct had an impact in New York."[165] Because Hoffman—who was neither a resident of New York nor employed in New York—did not allege in his complaint that Parade's discriminatory conduct had an impact in New York, the Court of Appeals held that the trial court properly dismissed his claim.[166]

IV. LABOR DEVELOPMENTS

A. NLRB Issues Rule Requiring Employers to Post Employee Rights Notice

On August 30, 2011, the National Labor Relations Board (NLRB) issued a final rule requiring all private sector employers subject to the National Labor Relations Act (NLRA), even those that are not currently unionized, to post an eleven-by-seventeen inch notice informing employees of their rights under the NLRA.[167] The final rule was initially set to take effect on November 14, 2011, but was postponed until April 30, 2012 due to lawsuits filed against the Board challenging its authority to implement the rule.[168]

Among other things, the notice informs employees of their right to "[o]rganize a union"; "[f]orm, join, or assist a union"; "[b]argain collectively through [a union] representative"; and engage in concerted

163. *Id.* (citation omitted).

164. *Id.* at 291, 933 N.E.2d at 747, 907 N.Y.S.2d at 148.

165. *Id.*

166. *Hoffman*, 15 N.Y.3d at 292, 933 N.E.2d at 748, 907 N.Y.S.2d at 149.

167. 29 C.F.R. § 104.202(a), (b) (2011); *see also Final Rule for Notification of Employee Rights*, NLRB, http://www.nlrb.gov/news-media/fact-sheets/final-rule-notification-employee-rights (last visited Mar. 20, 2012).

168. Subhash Viswanathan, *NLRB Postpones Effective Date of Notice-Posting Requirement*, N.Y. LAB. & EMP. L. REP. (Dec. 23, 2011, 1:28 PM), http://www.nylaborandemploymentlawreport.com/2011/12/articles/national-labor-relations-board-1/nlrb-postpones-effective-date-of-noticeposting-requirement/. On April 12, 2012, the United States Court of Appeals for the District of Columbia Circuit granted an injunction preventing the NLRB from implementing this posting rule. Accordingly, employers are not required to post this notice until the court determines whether the NLRB had the authority to issue this rule. *See* Subhash Viswanathan, *D.C. Circuit Court of Appeals Grants Injunction Precluding Implementation of NLRB Notice Posting Rule*, N.Y. LAB. & EMP. L. REP. (Apr. 17, 2012), http://www.nylaborandemploymentlawreport.com/2012/04/articles/labor-relations/dc-circuit-court-of-appeals-grants-injunction-precluding-implementation-of-nlrb-notice-posting-rule/.

activity with co-workers.[169] The notice also advises employees that it is illegal for employers (1) to prohibit employees from wearing union insignia, (2) to prohibit employees from talking about or soliciting a union during non-work time, or (3) to take adverse action against employees because of their union activity.[170]

There are three potential consequences for an employer's failure to post the notice. First, failure to post may be grounds for an unfair labor practice charge under the NLRA.[171] Second, such failure may toll the six month statute of limitations for filing an unfair labor practice charge against the employer, "unless the employee has received actual or constructive notice that the conduct [was] unlawful."[172] Lastly, the Board may consider "a knowing and willful" non-compliance with this posting requirement as evidence of unlawful motive in an unfair labor practice case.[173]

B. U.S. Supreme Court Finds State's Proscription of Class Action Waivers Preempted by the Federal Arbitration Act

On April 27, 2011, the United States Supreme Court decided *AT&T Mobility LLC v. Vincent Concepcion*, which further defines the scope of federal preemption of state-created limitations on arbitration under the Federal Arbitration Act (FAA).[174]

In *AT&T*, customers brought a putative class action suit against AT&T, a cellular telephone service provider, alleging false advertising and fraud.[175] AT&T moved to compel arbitration pursuant to the terms of its customer contract, which provided for arbitration of all unresolved disputes, but prohibited class-wide actions.[176] The district court denied AT&T's motion and the Ninth Circuit affirmed on the grounds that AT&T's arbitration agreement was unconscionable under California's *Discover Bank* rule, which provides that a class-action waiver in a consumer contract of adhesion is unconscionable in cases involving parties of disparate bargaining powers.[177]

In a five-to-four decision, the Supreme Court held that the

169. 29 C.F.R. §104 (Appendix to Subpart A).

170. *Id.*

171. *Id.* §§ 104.210, 104.211(a).

172. *Id.* § 104.214(a).

173. *Id.* § 104.214(b).

174. *See generally* 131 S. Ct. 1740 (2011).

175. *Id.* at 1744.

176. *Id.* at 1744-45.

177. *Id.* at 1745, 1746 (citing Discover Bank v. Superior Court of L.A., 113 P.3d 1100, 1110 (Cal. 2005)).

Discover Bank rule was preempted by the FAA.[178] The purpose of the FAA is to ensure that private arbitration agreements are enforced according to their terms.[179] Section 2 of the FAA contains a "savings clause" that "permits agreements . . . to be invalidated by 'generally applicable contract defenses . . . ,' but not by defenses that apply [solely] to arbitration or . . . derive their meaning from the fact that an agreement to arbitrate is at issue."[180] Moreover, as the Court noted, the savings clause does not "suggest an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives."[181] By preventing parties from prohibiting class-wide arbitration, the Court reasoned that the *Discover Bank* rule interferes with arbitration by eliminating informality, slowing down the process, making it more costly, and making it more likely to generate errors.[182]

V. PUBLIC SECTOR EMPLOYMENT

A. Claims Under First Amendment's Petition Clause Require Showing that Public Employees Petitioned About a Matter of Public Concern

In *Borough of Duryea, Pennsylvania v. Guarnieri*, the United States Supreme Court held that retaliatory actions by a government employer against a government employee do not give rise to liability under the First Amendment's Petition Clause,[183] unless the employee's petition relates to a matter of public concern.[184] After the Borough of Duryea (the "Borough") fired Guarnieri as its police chief, he filed a union grievance contesting his termination.[185] The grievance proceeded to arbitration under the police union collective bargaining agreement, and the arbitrator ordered Guarnieri reinstated after a disciplinary suspension.[186] Upon his return, the Borough issued eleven directives "instructing Guarnieri in the performance of his duties."[187] Guarnieri subsequently filed a lawsuit against the Borough claiming that his union grievance was a petition protected by the First Amendment and that the

178. *Id.* at 1753.

179. *AT&T Mobility*, 1315 S. Ct. at 1748.

180. *Id.* at 1746 (quoting Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996)).

181. *Id.* at 1748.

182. *Id.* at 1750-52.

183. The First Amendment protects "the right of the people . . . to petition the Government for a redress of grievances." U.S. CONST. amend. I.

184. 131 S. Ct. 2488, 2491-92 (2011).

185. *Id.* at 2492.

186. *Id.*

187. *Id.*

directives were issued in retaliation for that protected activity.[188]

Following Third Circuit precedent, the district court instructed the jury that the grievance was a petition protected by the Constitution, even though it addressed a matter of solely private concern.[189] Consequently, the jury found in Guarnieri's favor and the Third Circuit Court of Appeals affirmed.[190] On appeal to the Supreme Court, the Borough argued that a petition filed by a government employee must relate to a matter of public concern in order to constitute protected activity under the First Amendment.[191] Notably, courts outside of the Third Circuit have subscribed to this view, "rely[ing] on a substantial overlap between the rights of speech and petition to justify the application of Speech Clause precedents to Petition Clause claims."[192] The Supreme Court granted certiorari to resolve this conflict between the circuit Courts of Appeals.[193]

At the outset, the Court noted the longstanding rule that a public employee must demonstrate "that he or she spoke as a citizen on a matter of public concern" in order to allege a violation of the First Amendment's Speech Clause.[194] Furthermore, the Court explained that even if an employee spoke "as a citizen on a matter of public concern, the employee's speech is not automatically privileged. Courts balance the First Amendment interest of the employee against the 'interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'"[195] According to the Court, "[t]he substantial government interests [justifying] a cautious and restrained approach to the protection of speech by public employees are just as relevant when public employees proceed under the Petition Clause."[196] Vacating the judgment of the Third Circuit, the Court explained that "[t]he right of a public employee under the Petition Clause is a right to participate as a citizen, through petitioning activity, in the democratic process. It is not a right to transform everyday employment disputes into matters for constitutional litigation in the federal courts."[197]

188. *Id.*

189. *Borough of Duryea, Pa.*, 131 S. Ct. at 2492.

190. *Id*. at 2492, 2493.

191. *Id*. at 2493.

192. *Id.*

193. *Id*.

194. *Borough of Duryea, Pa.*, 131 S. Ct. at 2493 (citing Connick v. Myers, 461 U.S. 138, 147 (1983)).

195. *Id.* (quoting Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will Cnty., 391 U.S. 563, 568 (1968)).

196. *Id.* at 2495.

197. *Id.* at 2501.

B. Teachers' Union May Not Rely on FOIL to Obtain the Names of Prospective Members

The New York Court of Appeals, in a five-to-four decision, held that the invasion of personal privacy exception to the Freedom of Information Law (FOIL) allows school districts to avoid disclosing certain information about their employees.[198]

FOIL was created to ensure public access to agency records and to foster public inspection and copying of public records.[199] However, an entity subject to FOIL may deny access to records that if disclosed would constitute "[a]n unwarranted invasion of personal privacy," which includes the "sale or release of lists of names and address if such lists would be used for commercial or fund-raising purposes . . . ."[200]

In *Brighter Choice*, Petitioner New York State Unified Teachers (NYSUT) submitted FOIL requests to six charter schools "seeking . . . payroll records showing the full names, titles, corresponding salaries, and home addresses of all persons employed as teachers, instructors and faculty."[201] The Charter Schools partially denied the request, relying on the invasion of personal privacy exception to FOIL.[202]

While the appellate division unanimously held that disclosure was required, the Court of Appeals reversed, finding that NYSUT's purpose in seeking the names was to expand its membership, and, by extension, to obtain membership dues, which constituted a fundraising purpose under FOIL.[203] Noting that there was "no indication that NYSUT intend[ed] to use the names to, for example, expose governmental abuses or evaluate governmental activities," the Court further reasoned that ordering disclosure would not serve to assist the public in making "intelligent, informed choices with respect to both the direction and scope of governmental activities."[204]

VI. DEVELOPMENTS UNDER THE FAIR LABOR STANDARDS ACT

A. U.S. Supreme Court Finds Oral Complaints Protected Under the

198. N.Y. State United Teachers v. Brighter Choice Charter Sch., 15 N.Y.3d 560, 565-66, 940 N.E.2d 899, 902, 915 N.Y.S.2d 194, 197 (2010).

199. *Id.* at 563-64, 940 N.E.2d at 901, 915 N.Y.S.2d at 195.

200. N.Y. PUB. OFF. LAW § 89(2)(b)(iii) (McKinney Supp. 2012).

201. *Brighter Choice*, 15 N.Y.3d at 562, 940 N.E.2d at 899-900, 915 N.Y.S.2d at 194-95.

202. *Id.* at 563, 940 N.E.2d at 900, 915 N.Y.S.2d at 195.

203. *Id.* at 563, 564, 940 N.E.2d at 900, 901, 915 N.Y.S.2d at 195, 196.

204. *Id.* at 564-65, 940 N.E.2d at 901, 915 N.Y.S.2d at 196 (quoting Fink v. Lefkowitz, 47 N.Y.2d 567, 571, 393 N.E.2d 463, 465, 419 N.Y.S.2d 467, 470 (1979)).

FLSA

The U.S. Supreme Court, in a six-to-two decision, ruled that an employee's oral complaints about alleged wage and hour violations made to his supervisors and human resources personnel were sufficient to trigger the anti-retaliation provision of the Fair Labor Standards Act (FLSA), which makes it illegal "to discharge . . . any employee because such employee has *filed any complaint*," alleging an FLSA violation.[205] In this case, the plaintiff employee alleged that he was discharged because he complained that the employer violated the FLSA by not paying employees for time spent putting on and taking off their work-related protective gear.[206] Specifically, the plaintiff alleged that he orally complained on multiple occasions that the location of the employer's time clocks prevented workers from receiving credit "for time spent donning and doffing" their protective gear.[207]

Importantly, the Supreme Court's holding in this case overruled precedent from the Second Circuit Court of Appeals finding that the FLSA's protections did not cover informal oral complaints to supervisors.[208]

B. Second Circuit Finds Pharmaceutical Sales Representatives Not Exempt Under the FLSA

In *In re Novartis Wage & Hour Litigation*, the Second Circuit Court of Appeals held that pharmaceutical sales representatives were not exempt from the overtime pay requirements of the FLSA as either "outside sales" or "administrative" employees.[209] The court found that the Novartis sales representatives did not qualify under the outside sales employee exemption because they only promoted product to physicians and did not "sell" product to anyone.[210] Although the sales representatives provided physicians with free samples, Novartis sold its drugs to wholesalers, who then sold them to pharmacies, and the pharmacies ultimately sold the drugs to consumers.[211] The sales

205. Kasten v. Saint-Gobain Performance Plastics Corp., 131 S. Ct. 1325, 1329, 1336 (2011) (quoting 29 U.S.C. § 215(a)(3) (2006)).

206. *Id.* at 1329.

207. *Id.* (quoting Kasten v. Saint-Gobain Performance Plastics Corp., 556 F. Supp. 2d 941, 954 (W.D. Wis. 2008)).

208. *Id.* at 1330-31 *abrogating* Lambert v. Genesee Hosp., 10 F.3d 46, 55 (2d Cir. 1993).

209. *In re* Novartis Wage & Hour Litig., 611 F.3d 141, 149 (2d Cir. 2010), *cert. denied*, Novartis Pharm. Corp. v. Lopes, 131 S. Ct. 1568 (2011).

210. *Novartis*, 611 F.3d at 154.

211. *Id.* at 153-54.

representatives could not lawfully take an order for the drug's purchase or even obtain a binding commitment from the physician to prescribe the drug to patients.[212] Accordingly, because the sales representatives were not making sales, the court found they were not outside salespeople within the meaning of the FLSA or its regulations.[213]

With respect to the administrative exemption, the court found that the sales representatives were not exempt under the FLSA because they did not exercise the requisite amount of discretion and independent judgment to qualify for the exemption.[214] In making this determination, the court considered the following factors relevant: (1) that the sales representatives' marketing skills were gained and honed though detailed Novartis training sessions; (2) that the sales representatives were required to deliver "core messages" regarding the products and were not allowed to deviate from them; and (3) that the sales representatives did not play a role in developing Novartis's marketing strategy.[215]

In analyzing both exemptions, the court determined that the Secretary of Labor's interpretation of the regulations promulgated under the FLSA defining both outside sales and administrative employees, as set forth in the Secretary's amicus brief, were entitled to "controlling" deference.[216] The court also acknowledged that while a number of federal district courts have found pharmaceutical sales representatives to be exempt under the outside sales and/or administrative exemption, those cases were not binding and their reasoning did not persuade the court that it should disregard the Secretary's interpretations of the regulations.[217]

On February 28, 2011, the U.S. Supreme Court announced it would not review this decision,[218] leaving the circuits divided on the proper interpretation of the administrative and outside sales exemptions as applied to pharmaceutical sales representatives.[219]

212. *Id.* at 154.

213. *Id.* at 155.

214. *Id.* at 157.

215. *Novartis*, 611 F.3d at 156-57.

216. *Id.* at 149 (quoting Auer v. Robbins, 519 U.S. 452, 461 (1997)).

217. *Id.* at 154-55.

218. Novartis Pharm. Corp. v. Lopes, 131 S. Ct. 1568, 1568 (2011).

219. *Compare* Christopher v. SmithKline Beecham Corp., 635 F.3d 383, 401 (9th Cir. 2011) (finding pharmaceutical sales representatives FLSA exempt as outside sales employees). However, in late November 2011, the U.S. Supreme Court granted a petition for writ of certiorari with respect to the Ninth Circuit's decision. Christopher v. SmithKline Beecham Corp., 132 S. Ct. 760 (2011). The U.S. Supreme Court's decision is expected in June 2012 and will likely have a major impact on the pharmaceutical industry.

C. Second Circuit Rules That Jury, Not Court, Determines Whether an Entity is a Joint Employer under the FLSA

In *Zheng v. Liberty Apparel Co.*, the Second Circuit found that the district court properly allowed the jury, rather than the court, to ultimately determine the question of whether defendants were liable as the workers' joint employer under the FLSA.[220] In affirming the district court's decision, the court held that FLSA claims typically involve complex mixed questions of fact and law, and "[t]he jury's role was to apply the facts bearing on the multi-factor joint employment inquiry to the legal definition of joint employer, as that term had been properly defined by the district court in the jury charge."[221]

Notably, this case involved a lengthy procedural history, including a 2003 decision from the Second Circuit Court of Appeals setting forth the factors that should be reviewed in determining joint employer status.[222] Combining the two Second Circuit *Zheng* decisions, juries, rather than the courts, must ultimately decide the question of joint employer status primarily by evaluating the following six factors: (1) whether the workers work predominantly for the joint employer; (2) the permanence or duration of the working relationship; (3) whether the alleged joint employer's premises/equipment are used by the employees; (4) the extent of control exercised by the joint employer; (5) whether the workers are an integral part of the business; and (6) whether the workers had a business organization "that could . . . shift as a unit from one putative joint employer to another."[223]

220. 617 F.3d 182, 185 (2d Cir. 2010), *cert. denied*, Liberty Apparel Co. v. Zheng, 131 S. Ct. 2879 (2011).

221. *Zheng*, 617 F.3d at 185.

222. *See* Zheng v. Liberty Apparel Co., 355 F.3d 61, 72 (2d Cir. 2003). After setting forth these six factors, the Second Circuit remanded the case to the district court, and, eventually the case went to trial before a jury, which returned a verdict in favor of plaintiffs. *Id.*, *remanded to* 2009 WL 1383488, at *1 (S.D.N.Y. 2009). Following the resolution of various post-trial motions, the United States District Court for the Southern District of New York entered judgment accordingly. *Zheng*, 2009 WL 1383488, at *3. The defendants then appealed that judgment based primarily on the jury determining joint employer status. *Zheng*, 617 F.3d at 183.

223. *Zheng*, 355 F.3d at 72; *see also Zheng*, 617 F.3d at 186.