

EMPLOYMENT, LABOR & BENEFITS QUARTERLY

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Employment, Labor & Benefits Quarterly is a newsletter addressing current issues written by attorneys who regularly provide counsel in these changing areas of law.

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Court of Appeals Reverses WERC

A recent decision by the District II Court of Appeals reversed a decision of the Wisconsin Employment Relations Commission (WERC) that found a County had violated its duty to negotiate in good faith when it did not disclose its intention to subcontract some bargaining unit work during contract negotiations with the union representing employees affected by the subcontracting. In Washington County v. Wisconsin Employment Relations Commission, 2010AP582, the Court of Appeals held that Washington County ("County") did not violate its duty to bargain with the Service Employees International Union Local 150 when it negotiated a collective bargaining agreement but did not disclose that it was contemplating the subcontracting of custodial work that was performed by some members of Local 150. The language in the collective bargaining agreement allowed the County to subcontract for work so there was no need to negotiate over the decision to subcontract out the custodial work. The County had not decided that it was going to subcontract out the work while it was negotiating

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Important Case Happenings

So far, 2011 has not been a good year for employers before the U.S. Supreme Court. The Court has had three cases before it where employers prevailed at the lower levels, only to overturn the decisions in favor of the employees.

Oral Complaint Satisfies Filing Requirement to bring FLSA Retaliation Claim

In Kasten v. Saint Gobain Performance Corp., the issue before the Court was whether an oral complaint of a violation of the Fair Labor Standards Act is protected conduct under the Act's anti-retaliation provision. The FLSA protects employees who have "filed any complaint." In this case, Kasten verbally complained that the employer located its time clocks between the area where workers put on and took off their work-related protective gear and the area where they carry out their assigned tasks. That location prevented workers from receiving credit for the time they spent putting on and taking off their work clothes, contrary to the FLSA's requirements. Kasten was ultimately terminated from employment for failing to accurately log his time.

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Kasten then filed a claim, alleging retaliation based on his complaint over the FLSA violation. The employer argued that Kasten had failed to “file a complaint” as required by the FLSA, as he did not formally write a complaint. The Court balanced the interests of employees and employers to determine whether an oral complaint satisfied the filing requirement of the FLSA. First, the Court viewed the provisions of the statute dealing with anti-retaliation, and determined that regulation of the workforce was intended to be accomplished by employees having access to the courts, instead of federal supervision from an administrative agency. The Court determined that Congress did not intend to limit employees access to the justice system by requiring a high level of formality in initiating the complaint process.

The U.S. Supreme Court held that “the scope of statutory term ‘filed any complaint’ includes oral, as well as written, complaints.” A narrow interpretation would undermine the Act’s basic objective, which is to prohibit “labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers.”

The impact of this decision could broaden the number of potential retaliation claims employers must deal with. Is an employee just blowing off steam, or do they actually intend to file a complaint? Who is an appropriate person to orally complain that would trigger the filing of a complaint?

[Staub v. Proctor Hospital - Independent Investigation Insufficient to Avoid Liability of Discriminating Supervisor](#)

The plaintiff, a U.S. Army Reserve member, felt his supervisors were hostile toward accommodating his military obligations. While there was evidence of animosity by his immediate supervisors, there was no evidence to support a claim that the ultimate decision maker, the H.R. Director, had any animosity toward his protected activity. While the H.R. Director considered the alleged biased supervisors prior discipline, she conducted an independent investigation of the alleged work rule violation. Ultimately, the H.R. Director decided to terminate Staub’s employment.

The 7th Circuit Court found for the employer, finding that a “cat’s paw” case could not succeed unless the non-decision maker exercised such “singular influence” over the decision maker that the decision to terminate was the product of “blind reliance.” The Supreme Court (“Court”) reversed the 7th Circuit. The Court held that, to be liable under USERRA, the agent must have intended for adverse action to occur based on discriminatory reasons. Here, the hostility by the immediate supervisor was intended to cause adverse employment action, and it was a proximate cause of that action. Proximate cause requires only some direct relation between the injury asserted and the injurious conduct alleged and excludes only those links that are too remote, purely contingent, or indirect. The Court found that “an employer’s authority to reward, punish, or dismiss is often allocated among multiple agents. The one who makes the ultimate decision does so on the basis of performance assessments by other supervisors.” Thus, an independent investigation does not necessarily protect the employer from liability if the decision maker relies on facts provided by a biased supervisor. H.R. Directors must dig deeper before making decisions to reprimand or terminate.

[Employee Protected from Retaliation due to Association with Co-Worker - \[Thompson v. American Stainless, L.P.\]\(#\)](#)

An employee, Miriam Regalado, of North American Stainless filed an EEOC claim against Stainless, alleging that she had been discharged because she was a woman. Three weeks after Regalado filed her claim, Stainless terminated her fiancé, Eric Thompson who also worked for the company. Thompson then filed his own claim – alleging that North American Stainless retaliated against him for Regalado’s EEOC claim.

Stainless argued that Thompson could not bring a retaliation claim because he did not engage in any “protected activity” under Title VII. Protected activity is usually established by filing a complaint, bringing an EEOC charge, etc. The U.S. Supreme Court disagreed. The Court noted that Title VII’s anti-retaliation provision “must be construed to cover a broad range of employer conduct.” The Court noted that the anti-retaliation provision prohibits an employer from “discriminating against any of its employees” for engaging in protected conduct and prohibits conduct that might dissuade “a reasonable worker” from making or supporting a charge of discrimination. The Court went on to state that “[w]e think it obvious that a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiancé would be fired.” The Court was unwilling to establish what type of relationships are protected, although it is clear that the closer the relationship, the more likely the relationship will be protected.

with Local 150, but shortly after a settlement had been reached, the County decided to contract out the custodial work, which resulted in the layoff of some employees.

The WERC, the state agency with the authority to rule on prohibited practices by municipal employers and municipal employees, determined that the County had an obligation to notify Local 150 that it was contemplating the subcontracting of bargaining unit work as part of the County's consideration of how to reduce costs at the nursing home owned by the County. During the negotiations, the County made it clear that it was interested in exploring all cost-saving measures. The County even issued a formal request for proposals to subcontract the laundry and housekeeping services at the nursing home prior to ratifying the 2007-2008 collective bargaining agreement with Local 150. The WERC held that the County had a duty to notify the union that it was contemplating the subcontracting of bargaining unit work even though the contract language allowed the County to make that decision because there were no proposals to amend or limit the language on subcontracting that already existed in the collective bargaining agreement.

The Court of Appeals held that the WERC should follow its prior precedent in the case of City of Marshfield, No. 28973-B (WERC, March, 1988). In that decision, the WERC determined that the City did not negotiate in bad faith when it failed to disclose that wage increases that were the subject of bargaining would lead to the layoff of City employees. The WERC held that the union had the obligation to inquire about potential layoffs because the City had made it clear that it was looking for ways to reduce costs. The Court of Appeals held that the WERC should be consistent in its rulings and that the County did not have an obligation to disclose the serious possibility of subcontracting work unless the union inquired about potential subcontracting. The Court of Appeals held that the County did not act in bad faith when it exercised its clear, contractual right to subcontract the work as that language had been previously bargained and agreed to by the Union.

This decision shows that the prior rulings of the WERC should be honored and can be relied upon by the employer when making decisions about their conduct at the bargaining table or during interactions with a public sector union.

Mandatory Employee Contributions to WRS: What's a Governmental Employer to Do? (Hint: You May Need a Pick Up Resolution!)

As we wait for some sort of finality out of Madison relating to Wisconsin Act 10 (see our most recent alert "Implementation of Wisconsin Act 10 is Blocked Again by Dane County Circuit Court"), some governmental employers are already faced with the prospect of imposing mandatory Wisconsin Retirement System (WRS) contributions upon employees, due to recently implemented collective bargaining agreements. Others are preparing for a day when Wisconsin Act 10 (or some similar legislation) requires mandatory employee contributions from non-union represented employees.

What's a governmental employer to do? What is the "IRS criteria" that has to be met in order for mandatory employee contributions to be made pre-tax rather than after-tax? To assist governmental employers with these questions, we offer some Q&A's.

[Read the full article here.](#)

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Event: Annual Local Government Seminar

Topics:

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Presenters: Jason Nordby and John Preuss, M3 Insurance Solutions, Inc.
- The New Environment of Collective Bargaining for Public Sector Employees
Presenters: Dean Dietrich and Chris Toner
- Avoiding Conflicts of Interest in Local Government Decision Making: What are the Limitations of State Law Impacting Local Government Officials?
Presenters: Jeff Jones and Steve Immel

Date: April 26, 2011 @ The Great Dane

Sponsor: Ruder Ware

Additional detail can be found online at www.ruderware.com/seminars.

Please register by contacting Shannon Nest

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