

A Case Law Update

Recent Court Decisions Have Implications for Small Businesses

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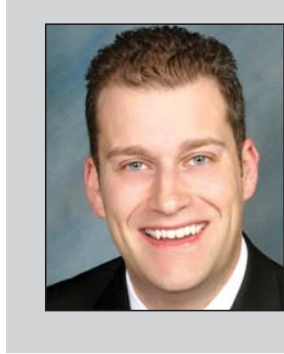
There have been several new developments in employment law that may have an impact on small business. These cases involve various issues, including wage-and-hour and retaliation claims. While the facts outlined below may be similar to something that you experience in your own business, it is critically important that you review the facts of any particular employment decisions with employment counsel to ensure a proper analysis.

In July, Judge Bertha Josephson issued an opinion relating to the Massachusetts Wage Act (MWA) that may have a profound impact on how businesses organize. To illustrate the significance of this decision, it is important to understand the MWA and how it may impact your business.

In 2008, the state Legislature amended the MWA by changing the damage award from discretionary to mandatory treble damages for any unpaid wages, plus an award for the employee's attorney fees and costs. The MWA holds liable not only the business, but also the president and treasurer of a corporation and any officers or agents involved in the management of such a corporation. Even if the business is incorporated, the statute permits employees to take action against individuals associated with the business and expose them to personal liability. In light of the MWA, the effect of non-payment or mispayment of wages can be profound, considering that, for every dollar not paid, the employer owes three dollars, plus attorney fees and costs.

Since the amendment removed the discretionary damage award, courts can no longer consider mistakes as a defense in wage-and-hour cases. Mistakes can include the misclassification of workers as exempt or non-exempt from overtime, the failure to pay for certain breaks, or even the mistaken belief that travel time is not compensable. These types of mistakes can be extremely costly in that they also expose individual corporate officers to personal liability.

In the case at hand, *Cook v. Patient EDU, LLC*, Josephson addressed the issue of personal liability under the MWA as it relates to a limited-liability company. She found that the managers of a limited-liability company are not personally liable in the same way that a president, treasurer, or other officer



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of a corporation is when wages go unpaid. In reviewing the plain language of the statute, she concluded that, if the Massachusetts Legislature had intended to include managers of a limited-liability company, the MWA would specify 'managers.' She further concluded that, since the term 'limited-liability company' does not appear alongside the term 'corporation,' the state Legislature intended to exclude it from the statute.

While this decision from the Superior Court is binding only on the parties involved in the litigation, in certainly provides some insight into the importance of selecting the correct corporate entity. Under *Cook*, limited-liability companies afford extra protections that other corporate entities do not.

In another case, which was decided by the U.S. Supreme Court, the scope of a retaliation claim was broadened. In *Thompson v. North American Stainless*, the fiancée of the plaintiff (Thompson) filed a sex-discrimination charge with the Equal Employment Opportunity Commission (EEOC) against his employer, the defendant North American Stainless (NAS), and NAS subsequently fired Thompson. He then filed his own charge of discrimination and subsequent suit claiming that NAS fired him to retaliate against his fiancée for filing her charge.

The lower court found in favor of NAS on the grounds that third-party-retaliation claims were not permitted under federal law. Ultimately, the case found its way to the Supreme Court, which found that, if the facts that Thompson alleged are true, his firing by NAS constituted unlawful retaliation. The court determined that federal law prohibits any employer action that might dissuade a reasonable worker from making or supporting a discrimination charge.

The court also found that Thompson fell within the zone of interests protected by federal law because he was an employee of NAS, and federal law protects employees from their employers' unlawful actions. The court went on to note that Thompson was not an accidental victim of the retaliation, but rather hurting him was the unlawful act by which NAS punished his fiancée.

Safety First

In another case, the Mass. Court of Appeals reviewed the interrelationship between whistleblowing, handbooks, and the 'at-will' employment doctrine. In *Chernov v. Home Depot Inc.*, the plaintiff was an excellent salesperson who spent the first three years of his employment at Home Depot on the store's safety committee, which met regularly to discuss issues of importance. Chernov constantly reported violations of internal company safety rules to management and to "anybody who would listen." Even though he acknowledged that he had never read the fire code and was unaware of any specific legal codes violated by Home Depot, he reported what he believed to be violations of the fire code. He also reported other conditions that he believed posed tripping, cutting, or crushing hazards to his coworkers and the public.

The plaintiff contacted the confidential employee hotline to report ongoing, uncorrected safety problems. In response to Chernov's complaints, the store manager drafted a safety audit form. Chernov completed the audit forms for his department at the request of his manager on a weekly basis, and he continued to note significant numbers of safety issues. On April 9, 2004, Home Depot terminated the plaintiff, three

weeks after he reported some safety violations. Chernov then brought suit against Home Depot in the Mass. Superior Court for wrongful termination and breach of contract. The Superior Court dismissed the lawsuit, and Chernov appealed.

In reviewing the causes of action, the Court of Appeals reversed the Superior Court's dismissal. In so doing, it found that, in certain circumstances, an employer violates public policy by firing an employee who performed an important public deed — including whistleblowing — even though the law did not require the employee to perform it. A jury, the court noted, could conclude that Chernov reasonably believed that some of the safety issues posed a threat to the public safety and were otherwise unlawful.

The court noted that, under Massachusetts law, an at-will employee may not be fired for reporting circumstances that the employee reasonably and in good faith believes violate

public-safety laws and present a threat to the public safety. Here, the court noted that a jury could find that the plaintiff reasonably believed that at least some of Home Depot's acts and omissions, particularly those relating to blocked exits and water valves, posed a threat to public safety and were otherwise unlawful.

Next, the court addressed Chernov's argument that the Home Depot code of conduct created an implied contract. The court noted that, although an employee handbook or personnel manual may create a duty on the part of the employer that can be enforced in an action for breach of contract, in this case it did not. The court noted that the code of conduct contained explicit language that it did not create a contract between Home Depot and its associates nor make promises of any kind. Under such a rationale, the court affirmed the dismissal of the plaintiff's breach-of-contract claim.

It is clear from the cases set forth above that courts will closely examine the conduct of employee and employees. Great care should be taken in preparing employee handbooks, codes of conduct, and other guidelines for the behavior of employees. Special attention should also be taken in compensating employees to ensure compliance with the state and federal wage-and-hour laws. ■

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