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BEFORE YOU HIT "SEND"

Attorney-Client Privilege May Not Apply to Your Work Emails!

*by Jason Rossiter**

A California court recently held that emails between an employee and his or her attorney are not privileged and confidential if sent or received via the employee's work email. *Holmes v. Petrovich Development Co., LLC*, 2011 Cal. App. LEXIS 33 (Cal. App. 3d Dist. Jan. 13, 2011).

Gina Holmes worked at Petrovich Development ("Petrovich") for two months as an administrative assistant. She quit after her boss made several comments regarding her pregnancy. Holmes alleged sexual harassment, retaliation, wrongful discharge in violation of public policy, violation of her right to privacy, and intentional infliction of emotional distress. The case, however, came to a quick close after Petrovich showed that Holmes only sued after being prodded by a lawyer. Petrovich did this by using emails Holmes sent and received from her attorney through her work email account.

In determining whether the emails sent from Holmes's work account were discoverable, the court examined whether the emails were confidential and whether any privilege applied. The court found that emails sent by Holmes to her attorney regarding possible legal action against her former employer did not constitute "confidential communication between client and lawyer" within the meaning of California's Evidence Code § 952. The court reasoned that the emails sent via her company computer "were akin to consulting her lawyer in her employer's conference room, in a loud voice, with the door open, so that any reasonable person would expect that their discussion of her complaints about her employer would be overheard by him."

The court concluded that the emails were not protected because Holmes used her work email account to send the emails to her attorney. Petrovich also told Holmes of the company's policy (via employee handbook) that its computers were to be used only for company business and that employees were prohibited from using them to send or receive personal email. The employee handbook further warned that the company would monitor its computers for compliance with this company policy and thus might "inspect all files and messages . . . at any time." *Id.* Additionally, Petrovich explicitly advised Holmes that employees using company computers to create or maintain personal information or messages "have no right of privacy with respect to that information or message." *Id.*

This ruling, while based on California Evidence Rules, could have a significant impact on the developing area of e-discovery and attorney-client privilege issues. This decision reflects the ever-changing area of attorney-client privilege in the era of emails and social media.

**Jason Rossiter practices in all areas of employment litigation and is licensed to practice law in Ohio, Pennsylvania, and California. For more information about the developing area of e-discovery and attorney-client privilege issues, please contact Jason at 216.696.4441 or bjr@zrlaw.com.*

Zashin & Rich Co., L.P.A. represents individuals in all facets of domestic relations law and employers in all aspects of employment and labor law.

National Labor Relations Act Preempts State Wrongful Discharge Claim

*by Patrick J. Hoban**

Timothy Lewis ("Lewis"), a former supervisor at Whirlpool's plant in Marion, Ohio, brought a claim for wrongful termination in violation of Ohio public policy. The United States District Court dismissed Lewis' complaint for lack of subject matter jurisdiction, holding that his claim was preempted by the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158. The United States Sixth Circuit Court of Appeals recently upheld the dismissal. *See Lewis v. Whirlpool Corp.,* No. 09-4231, 2011 U.S. App. LEXIS 593 (6th Cir. Jan. 12, 2011).

Whirlpool employed Lewis from 1997 until 2007. In 2004, several Whirlpool employees began wearing pro-union shirts and meeting with union representatives. Whirlpool's Marion facility was not unionized at the time. Lewis contended that he was pressured to "build a case" against two pro-union employees. He claimed that Whirlpool told him if he did not terminate two of the employees that Whirlpool would retaliate against him. He further claimed that Whirlpool transferred him to a less-desired area of the facility after he refused to terminate the employees.

Whirlpool discharged Lewis on April 2, 2007, for improperly clocking in one employee using the time badge of a different employee. Lewis presented evidence that another employee actually committed the transgression, but to no avail.

After his termination, Lewis filed a charge with the National Labor Relations Board ("NLRB"). The NLRB conducted an investigation and found that Whirlpool did not violate the NLRA. Specifically, the NLRB stated the charge was "without merit since no clear evidence established that it terminated [Lewis'] employment . . . because [he] refused to commit unfair labor practices on its behalf during a previous union organizing campaign some three years earlier." The NLRB informed Lewis that if he did not voluntarily withdraw his charge, the NLRB would withdraw it for lack of merit.

The Sixth Circuit found that Lewis's claim was subject to the *Garmon* preemption. *See San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). In Garmon, the United States Supreme Court held "[w]hen it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the NLRA, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that . . . jurisdiction must yield to the NLRB." *Id.* at 244. The Court found that Lewis was essentially alleging an unfair labor practice under the NLRA and his remedy was exclusively with the NLRB. The Court further when on to state that Lewis could have brought (and did bring) a claim before the NLRB – and that the claim he asserted in his Complaint was *identical* to the claim he brought before the NLRB.

Lewis argued that the preemption should not apply because as a "supervisor" he was not covered by the NLRA, but the Court was not persuaded. The Court stated that a "supervisor does have a viable claim under the NLRA when terminated or otherwise disciplined for refusing to commit unfair labor practices." *See Lewis*, 2011 U.S. App. LEXIS 593 at *6-7. The Court found "[t]he sole dispositive inquiry for [his] claims is whether Lewis was terminated for the failure to commit unfair labor practices." *Id.* at *7. Holding that charge with the NLRB and his Court action were identical, the Court held that Lewis' wrongful termination claim was preempted and dismissed his suit. This case reinforces the wide jurisdiction of the NLRB over labor claims and reminds employers to be mindful of whether they are properly in the court system.

**Patrick J. Hoban, an OSBA Certified Specialist in Labor and Employment Law, appears before the National Labor Relations Board and practices in all areas of labor relations. For more information about the NLRA or labor law, please contact Pat at 216.696.4441 or pjh@zrlaw.com.*

YOU'RE (NOT) FIRED

Supreme Court Holds that Title VII's Retaliation Protection Extends to Third Parties

*by Stefanie L. Baker**

Recently, the United States Supreme Court held in *Thompson v. North American Stainless, LP*, No. 09-291, 562 U.S. __ (2011) that a terminated employee may have a claim for retaliation under Title VII – *even if the employee never engaged in protected activity*. An employee may have a Title VII claim if he alleges that his termination was in response to *another employee's* allegations of discrimination.

The petitioner in this case, Eric Thompson ("Thompson"), worked at North American Stainless ("North American") with his fiancée (now wife) Miriam Regalado ("Regalado"). Regalado filed a sex discrimination charge against North American. Three weeks after North American was notified of Regalado's complaint, Thompson was fired for "performance-based reasons."

Thompson filed a charge with the Equal Employment Opportunity Commission ("EEOC") alleging discrimination and retaliatory discharge under Title VII. The EEOC issued Thompson a right to sue letter, and he filed suit. The court granted summary judgment for North American, asserting that Title VII did not permit a retaliatory discharge claim by a plaintiff who did not engage in protected activity himself. The Sixth Circuit initially reversed. Later, sitting *en banc*, the Sixth Circuit affirmed the Trial Court's decision that Thompson was not protected under Title VII.

As it turns out the Sixth Circuit had it right the first time, as the United States Supreme Court reversed, stating that Thompson could bring his claims under Title VII because he fell within the "zone of interest" protected by Title VII. According to the Court, the case presented two questions: (1) was Thompson's termination unlawful, and (2) if so, did he have a cause of action.

The court quickly answered the first question in the affirmative, stating that a reasonable worker would be dissuaded from engaging in protected activity based upon the circumstances in this case. In answering the second question, the Court advanced the "zone of interest" test. An employee falls within the zone if: (1) he is an employee of the company; (2) he was not an accidental victim of retaliation; (3) he was injured as a means of harming the employee who engaged in protected activity; and (4) injuring the employee was the unlawful act by which the employer punished the other employee. The Court found that Thompson fell within the intended protected class under Title VII.

This case illustrates the willingness of the Court to extend protections to employees in retaliation cases. However, the Court refused to draw a bright-line rule as to where the "zone of interest" stops. From this case, it is clear that termination of a fiancé would create a third-party cause of action under Title VII. Time will tell how far beyond that the courts will extend the zone. Employers now must handle with care employees who engage in protected activity, and those closely associated with them.

**Stefanie L. Baker practices in all areas of employment litigation. For more information about how the Supreme Court's ruling may affect you, please contact Stefanie at 216.696.4441 or slb@zrlaw.com.*

Is it Easier to Prove Age Discrimination Under Ohio Law?

*by Lois A. Gruhin**

Plaintiffs in Ohio may now have an easier time proving age discrimination. The Tenth Appellate District recently held that Ohio's Age Discrimination Statute, Ohio Revised Code § 4112, does not require a plaintiff to prove that her age was the "but-for" cause for termination. *See Thomas v. Columbia Sussex Corp.*, 2011-Ohio-17 (10th App. Dist. Jan. 6, 2011).

The Age Discrimination Employment Act of 1967 ("ADEA") states that an employer cannot discharge an employee "because of" her age. See 29 U.S.C. § 623(A)(1). In *Gross v. FBL Financial Services, Inc.*, 129 S.Ct. 2343 (2009), the Supreme Court held that the phrase "because of" or "by reason of" requires at least a showing of "but-for" causation. As a result, a plaintiff who filed suit under the federal ADEA must prove that *but for* her age, she would not have been terminated.

Plaintiff Charlotte Thomas sued her former employer, the Courtyard by Marriott Hotel ("Marriott"), after the hotel discharged her. Thomas brought her claim under Ohio age discrimination law and not the ADEA. Thomas was 67 at the time of her termination. Based on *Gross*, the employer requested a "but-for" jury instruction. The trial court refused and instructed the jury to consider whether the plaintiff's age was "a determining factor" in Marriott's decision to terminate her employment.

The Tenth Appellate District rejected the employer's argument that the jury instructions were improper. The court held that the phrase "a determining factor" did not alter the burden of proof set forth in *Gross*. The court further held that "a determining factor" was the equivalent causation required under the *Gross* decision. Additionally, the court stated that the jury instructions made clear that Thomas always retained the burden of proving discrimination based upon her age. The court was not required to use the exact phrase requested by the employer – especially because the *Gross* decision states that "but-for" can mean many things, including "based on," "by reason of," and "because of."

The *Thomas* decision likely will shape Ohio's age discrimination law and the jury instructions appropriate under Ohio Revised Code § 4112. Proving age was the "but-for" reason for termination is arguably a more difficult burden than that required by *Thomas*. As a result, plaintiffs in Ohio now may have an easier time proving age discrimination under Ohio law as compared to the ADEA. This case is now on appeal to the Ohio Supreme Court. We will continue to keep you advised of the age discrimination standard under Ohio law.

**Lois A. Gruhin, a member of the firm's Columbus office, practices in all areas of employment litigation. For more information about how Ohio's discrimination laws differ from federal discrimination laws, please contact Lois at 614.224.4411 or lag@zrlaw.com.*

Massachusetts' "Ban the Box" Law Became Effective November 4, 2010

*by David R. Vance**

On November 4, 2010, Massachusetts' "ban the box" law became effective. The law prohibits both private and public employers from asking questions about an applicant's criminal history on written job applications. The law's moniker comes from the commonly used check "yes" or "no" boxes used to respond to questions related to an employee's criminal history. As of November 4, 2010, Massachusetts banned the use of such boxes or related questions. The law includes a few exceptions for certain jobs and smaller employers. In addition, national or international employers that hire individuals in Massachusetts may continue to ask about an applicant's criminal history on their applications so long as they include an obvious disclaimer notifying Massachusetts applicants that they need not answer such questions.

If you are an employer operating in Massachusetts and have not done so already, you should change your application to comply with this new law.

**David R. Vance practices in all areas of employment law. For more information about hiring laws or other employment matters, please contact David at 216.696.4441 or drv@zrlaw.com.*

New York's Wage Theft Prevention Act Becomes Effective April 9, 2011

*by Stephen S. Zashin**

On December 13, 2010, New York legislators passed the Wage Theft Prevention Act ("the Act") which becomes effective April 9th, 2011. The Act imposes new regulations regarding the payment of wages and increases the penalties for wage payment violations.

New York law currently requires employers to inform new hires of their designated pay date, rate, and overtime rate (if applicable). The Act expands this regulation and requires employers to issue a notice with similar information upon hire and by February 1st of every year. This notice must include: dates of work covered, employer's address and telephone number, the rate of pay and the manner in which it is paid (hourly, salary, commission), gross wages, net wages, deductions, and allowances against minimum wage. The notice for non-exempt employees also must include: the regular rate, overtime rate, and the number of regular and overtime hours worked. Additionally, employers must keep records for six years, which include written notices and accompanying written acknowledgements.

The Act also provides penalties for employers who violate the regulations permitting employees to recover damages through civil action. Employers can avoid these penalties by making complete and timely payment to employees. The Act affects virtually all New York employers. As a result, New York employers should review their payroll practices to ensure compliance with the Act.

**Stephen S. Zashin, an OSBA Certified Specialist in Labor and Employment Law, is licensed to practice law in Ohio and New York. Stephen's practice encompasses all areas of employment and labor law. For more information about wage and hour laws or any other employment matter, please contact Stephen at 216.696.4441 or ssz@zrlaw.com.*

Collective Bargaining Contracts in 2010 Had a Modest 1.6 Percent Average First-Year Wage Hike

*by Ami J. Patel**

According to data from the Bureau of National Affairs, Inc. ("BNA"), first-year wages in collective bargaining agreements reviewed increased 1.6 percent. This is down from the prior year's 2.3 percent increase and represents a national shift to smaller increases. BNA found decreases across the board in all sectors. For 2010, the median first-year wage increase was 1.7 percent as compared to 2009's 2.5 percent, while the weighted average was 1.8 percent in 2010 and 2.7 percent in 2009.

In addition to smaller wage increases, retirement plans, insurance costs, and other employee benefits were major topics of negotiation during 2010. Employers must consider changes in these as well as other employee benefits when evaluating these figures. For example, factoring lump-sum payments into the wage calculations creates a 2010 first-year average wage increase of 1.9 percent, as compared with 2.6 percent in 2009. When excluding construction and state and local government agencies, the number jumps dramatically. Without these entities, the 2010 increase was 2.5 percent and the 2009 increase was 3.1 percent.

It is difficult to get a picture of collective bargaining by looking only at first-year wage increases, but the numbers are instructive and can be used during negotiations.

**Ami J. Patel practices in all areas of labor and employment law, with a focus on private and public sector labor law. For more information on BNA statistics or any other labor or employment issue, contact Ami at 216.696.4441 or ajp@zrlaw.com.*

Z&R Shorts

Welcome Ami J. Patel

Zashin & Rich Co., L.P.A. is pleased to announce the addition of Ami J. Patel to its Employment and Labor Group.

Ami's practice focuses on private and public sector labor relations and employment issues.

Prior to joining Zashin & Rich Co., L.P.A., Ami worked as an Assistant Director of Law for the City of Cleveland. Ami's experience includes advising and defending management in FMLA, FLSA, ADA, ADEA, Title VII, and USERRA issues, wage and hour disputes, and disciplinary matters. She has experience analyzing civil service status and representing employers at arbitration hearings, the State Employment Relations Board, the Equal Employment Opportunity Commission and in state and federal courts.

Ami earned her B.A from Ohio University, *magna cum laude*. She then earned her law degree (J.D.) from Case Western Reserve University. Ami is admitted to practice law in the State of Ohio, the United States District Court for Northern Ohio, and the Sixth Circuit Court of Appeals. She is a member of the Cleveland Metropolitan Bar Association.

Please join us in welcoming Ami to Z&R!

Zashin & Rich Congratulates its

2011 SUPERLAWYERS

- ★ George S. Crisci
- ★ Jon M. Dileno
- ★ Andrew A. Zashin
- ★ Stephen S. Zashin

2011 RISING STARS

- ★ Patrick J. Hoban
- ★ Jason Rossiter
- ★ David R. Vance
- ★ Patrick M. Watts

Senate Bill 5 FREE Seminar

Tuesday, April 12, 2011
10:00 am - Noon *(lunch to follow)*

Location:
Quicken Loans Arena
1 Center Court
Cleveland, Ohio 44115
Northeast Arcade Entrance
(Next to the Team Shop)

Description: Zashin & Rich Co., L.P.A. presents a free seminar regarding Senate Bill 5, including a comprehensive review of the new law, analysis of its effect on your collective bargaining issues, and strategies for using the new provisions to your best advantage, as well as the likely challenges posed by organized labor (referendum, lawsuits).

CLE credits are pending.

There is limited seating available for this free seminar. To make a reservation or receive more information, please contact Heather Hatfield (hlh@zrlaw.com) at 216.696.4441.

ZASHIN & RICH CO., L.P.A.

cleveland office:
55 public square, 4th floor
cleveland, ohio 44113
p: 216.696.4441
f: 216.696.1618

columbus office:
17 south high street, suite 750
columbus, ohio 43215
p: 614.224.4411
f: 614.224.4433

www.zrlaw.com

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