

# EMPLOYMENT LAW ALERT

February 2010

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SAVE THE DATE!

RMF "Best Practices" Roundtable Seminar

*"Social Media: Reaping The Benefits While Protecting  
Your Business And Its Reputation"*

Wednesday, March 24, 2010

8:00 a.m. to 10:00 a.m.

at the offices of Ruskin Moscou Faltischek, P.C.

## Jury's Award In Step With Supreme Court's Extension of Retaliation Protection

By: Jeffrey M. Schlossberg



Earlier this month, a jury awarded an employee \$1.5 million in compensatory damages, back pay and front pay resulting from a lawsuit in which the employee claimed that she was fired in retaliation for participating in her company's investigation into workplace harassment. Just last year, in this same case, the United States Supreme Court unanimously permitted the case to go trial by holding that the employee, who was interviewed as part of the employer's own workplace harassment investigation, was protected under Title VII's anti-retaliation provision. The Supreme Court ruled that it was not necessary for an employee to actually file a formal complaint before benefiting from Title VII's protection. Participating in the investigation was sufficient to insulate the employee from unlawful retaliatory action.

Employers should take caution from the Supreme Court's decision and the resulting jury verdict. Depending on the circumstances and the timing, courts have considered certain actions to be

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retaliatory even though they did not result in a firing or demotion. Thus, office reassignment, change of shifts and other more subtle acts can still constitute retaliation. And, significantly, in cases where a retaliation claim is based on the assertion of a complaint, the employee does not have to assert a winning underlying claim of discrimination to succeed on the retaliation claim. Rather, the employee only needs to assert that he or she made a complaint in good faith.

In sum, should an employee assert a complaint of discrimination or harassment or participate in a related company investigation, that employee is protected under Title VII from adverse retaliatory actions. Employers should exercise extreme care before taking personnel action involving an employee who either has asserted a complaint or participated in an investigation. As can be seen from this case, a successful retaliation plaintiff can obtain a multi-million dollar jury verdict.

## **FLSA Exemption Not Applicable to Sales Staff**

A federal appellate court in New York held that the administrative exemption under the Fair Labor Standards Act does not apply to a publisher's regional director of sales. As a general rule, and contrary to popular belief, inside sales people are not exempt.

Many employers are familiar with the administrative exemption that states an employee is exempt from overtime if he is paid a fixed weekly salary of at least \$455, performs office or non-manual work that is directly related to the management or general business operations of the employer, and exercises discretion and independent judgment in matters of significance. Federal regulations provide, however, that the exemption does not apply if an employee is engaged in the production of the employer's product.

In this case, the Court of Appeals concluded that the director of sales for a publisher of a free publication, and whose primary revenue was generated by advertising, was entitled to overtime. Because the director's primary duty was to sell ad space, the court ruled that sales of the ad space were the employer's product. Thus, the exemption did not apply. The Court reasoned that an employee making specific sales to individual customers was not exempt whereas an employee encouraging an increase in sales generally could be exempt.

Misclassifying employees as exempt when they are not exempt can be costly. Employees can bring federal lawsuits seeking unpaid overtime for up to six years, along with penalties and attorneys' fees. Equally important, claims also can be brought by the federal and state departments of labor.

Because of the vagueness in the definition of the administrative exemption, it is one of the more difficult exemptions to analyze. Thus, to the extent employers decided to classify an employee under the administrative exemption (or any exemption for that matter), the company must carefully scrutinize, along with its

counsel, the exemption designation prior to implementation.

If we can be of assistance on these or any employment law issues, please do not hesitate to contact us.



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