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MEMORANDUM

DATE: July 2, 2013

TO: Hotel Association of New York City, Inc.
Labor Relations Members
General Managers, Human Resources Directors and Controllers

FROM: Kane Kessler, P.C.
Labor and Employment Law Department

RE: **United States Supreme Court and New York State Court of Appeals Rulings**

Last week saw a flurry of decisions by the U.S. Supreme Court and New York's Court of Appeals that are significant.

Those decisions are summarized as follows:

A. United States Supreme Court

University of Texas v. Nasser: In this case, decided on June 24, 2013, the Court ruled that the standard of proof for a claim of retaliation under Title VII of the Civil Rights Act is a "but for" standard, a more employer-friendly standard than that required to prove a substantive discrimination claim under Title VII.

Title VII prohibits discrimination in employment on the basis of race, color, gender and religion. It also prohibits retaliation against an employee for reporting, complaining about or participating in an investigation of discrimination under Title VII. In 1991, Congress amended Title VII by providing that where there is direct evidence of discrimination, the plaintiff need prove only that his protected class – race, color, gender or religion – was a "motivating factor" in the adverse employment decision and not necessarily the only factor. Congress intended by its amendment to make it easier for plaintiffs to prove that an adverse employment decision was discriminatory.

In Nasser, the Court held that unlike substantive discrimination claims, claims of retaliation under Title VII are not covered by the 1991 amendment and therefore the "motivating factor" standard does not apply. Instead, the Court ruled, retaliation claims must be proved by a stricter "but for" standard. That is, a plaintiff must prove that the adverse action would not have occurred "but for" the plaintiff's membership in a protected class.

The tougher standard of proof for plaintiffs in retaliation claims should help to moderate the significant increase in retaliation claims over the past decade and give employers a greater opportunity to defeat such claims at the summary judgment stage.

Vance v. Ball State University: In this case, also decided on June 24, 2013, the Court held that for purposes of liability under employment discrimination laws, a "supervisor" must be someone who can make tangible employment decisions "effecting a significant change" in another employee's employment status, such as hiring, firing, demoting, promoting, transferring and disciplining. The Court expressly rejected the definition of "supervisor" promulgated by the Equal Employment Opportunity Commission ("EEOC"), which included individuals who do not have the authority to make tangible employment decisions effecting a significant change, but who direct other employees' day-to-day activities.

The narrower definition of "supervisor" can be crucial in harassment cases under the discrimination laws. An employer can be held strictly liable for harassment by a supervisor even if the employer did not know about such harassment, but can be only held liable for harassing conduct of a non-supervisor only if the employer was negligent – that is, if it actually knew or should have known of the employee's conduct and failed to take reasonable steps to remedy the situation.

Genesis Healthcare Corp v. Symczyk: In this case, decided on April 16, 2013, the Court held that in a Fair Labor Standards Act ("FSLA") case where the named plaintiff is seeking to certify a collective class, the entire case becomes moot and must be dismissed if the named plaintiff is offered complete recovery of her alleged lost wages and attorney's fees before the collective class is certified.

Under the FLSA, a named plaintiff can bring what is known as a "collective action" lawsuit for wage and hour violations on behalf of herself and "other similarly situated employees" (the so-called "collective class"). After the complaint is filed, the named plaintiff must make a motion in court to certify a collective class. If the collective class of similarly situated employees is certified, the named plaintiff's attorney can contact the members of the class and ask if they would like to join the lawsuit and class members then have the opportunity to opt in to the lawsuit.

In Genesis, shortly after the complaint was served but before a collective class was certified, defendant's counsel sent the named plaintiff an Offer of Judgment pursuant to the Federal Rules of Civil Procedure, offering her the full amount she was claiming in the lawsuit, plus "such reasonable attorney's fees, costs and expenses as the Court may determine." When she declined the offer, defendant moved to dismiss the case, arguing that because it had offered the named plaintiff complete relief, she no longer possessed a personal stake in the outcome of the suit and the entire action – including the proposed collective action – was moot.

The Supreme Court, in a decision written by Justice Thomas, ruled in favor of the defendant and held that where a named plaintiff has been offered complete relief before a collective class has been certified, the entire case is moot and must be dismissed.

This case provides employers with an avenue for avoiding far riskier and more costly collective actions under the FLSA by offering complete relief to the original named plaintiff, a strategy which should be seriously considered when faced with a potential collective action.

B. New York Court of Appeals

Barenboim et al v. Starbucks and Winans v. Starbucks are consolidated cases brought against Starbucks under §196-d of New York State Labor Law. In Barenboim, several baristas claimed that it was unlawful for Starbucks to require that shift supervisors share in the tip pool. In Winans, to the contrary, several assistant store managers claimed that it was unlawful for Starbucks to exclude them from the tip pool.

Shift supervisors primarily serve customers and do not have the authority to hire, fire or discipline employees; however, they have limited supervisory authority to assign baristas to particular positions, direct the flow of customers and provide feedback to baristas about their performance. Plaintiffs (baristas) argued that any supervisory authority makes an employee an agent of the employer and therefore prohibited by New York State Labor Law §196-d from sharing tips.

Assistant store managers, on the other hand, assist store managers in interviewing applicants, assign work shifts, evaluate employee performance and participate in the decision to hire and fire. Plaintiffs (assistant store managers) argued that they could not be excluded from the tip pool because they spent the majority of their time performing customer – oriented services.

The Court of Appeals, New York's highest court, noted that only employees who regularly perform direct services to customers may participate in the tip pool. But it noted that even if an employee has some supervisory authority, they are not excluded from the tip pool, pointing out that New York State's Hospitality Wage Order specifically identifies captains as employees allowed to participate, even though they typically direct work flow. The Court held that the line between those employees who are permitted to share in the tip pool and those who are not, should be drawn at "meaningful or significant authority or control over subordinates." Such "meaningful" authority includes the ability to discipline, assist in evaluations or have input into the creation of schedules which influences the number of hours worked by the staff. Therefore, shift supervisors who do not have any "meaningful" authority can share in the tip pool, but assistant store managers who do have "meaningful" authority cannot share in the tip pool.

If you have any questions about any of these decisions, please contact David Rothfeld, Judith A. Stoll, Lois Traub, Niki Franzitta , Alexander Soric, or Robert L. Sacks of the Firm's Labor & Employment practice group.

cc: Joseph E. Spinnato, Esq.
Geoffrey A. Mills, Chairman