

## Client Alert **Employment & Labor**

### *Third Party Retaliation Claims under Title VII, the Discovery Rule under the NJLAD, and the Self-Critical Analysis Privilege under the FLSA*

Employers conducting business in the New Jersey/New York markets should take note of several recent employment-related decisions. In Thompson v. North American Stainless, LP, 2011 U.S. LEXIS 913 (Jan. 24, 2011), the United States Supreme Court ruled that an employee who claimed he was fired because his fiancée filed a sex discrimination charge against their mutual employer could pursue a retaliation claim under Title VII of the Civil Rights of 1964. In Henry v. New Jersey Department of Human Services, 2010 N.J. LEXIS 1260 (Dec. 10, 2010), the New Jersey Supreme Court held that a terminated employee should have the opportunity to avail herself of the “discovery rule” and demonstrate that she acted reasonably in pursuing her discrimination claim in order to avoid a dismissal on statute of limitations grounds. In Craig v. Rite Aid Corporation, 2010 U.S. Dist. LEXIS 137773 (M.D. Pa. Dec. 29, 2010), discussed in the HR Tip of the Month, the Middle District of Pennsylvania declined to recognize the “self-critical analysis” privilege to protect a company’s voluntary internal assessment of its compliance with the Fair Labor Standards Act (FLSA), labor laws and existing bargaining agreements.

#### **Thompson v. North American Stainless, LP**

Eric Thompson and his fiancée were both employed by North American Stainless (NAS). Three weeks after being notified by the Equal Employment Opportunity Commission (EEOC) that Thompson’s fiancée had filed a charge of discrimination, NAS fired him. Thompson then filed a charge with the EEOC and later filed suit in federal court claiming that NAS fired him in order to retaliate against his fiancée.

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The district court granted summary judgment to NAS, holding that Title VII did not permit third party retaliation claims. An en banc panel of the Sixth Circuit affirmed, concluding that because Thompson did not engage in any statutorily protected conduct, he was not included in the class of persons for whom Congress created a retaliation cause of action. The United States Supreme Court granted certiorari, and in an 8-0 decision, reversed the appellate panel.

The Court considered two questions: first, whether NAS's firing of Thompson constituted unlawful retaliation; and second, did Title VII grant him a cause of action. The Court had little difficulty answering the first question in the affirmative, finding that if the facts alleged by Thompson were true, then his termination violated Title VII. Relying on past precedent, Justice Scalia, writing for the Court, observed that Title VII's anti-retaliation provision, unlike the substantive provision, was not limited to discriminatory acts that affected the terms and conditions of employment. Rather, it prohibited any employer action that might dissuade a reasonable worker from making or supporting a charge of discrimination. The Court thought it obvious that a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiancé would be fired.

Regarding the second question, the Court addressed whether "aggrieved" under Title VII should be construed in a matter consistent with Article III standing, which requires only injury in fact caused by the defendant and remediable by the court. Justice Scalia concluded that "aggrieved" must be construed more narrowly. He also rejected the position advanced by NAS – that a "person aggrieved" refers only to the employee who engaged in protected activity. The Court adopted the "zone of interests" test, holding that "aggrieved" under Title VII enabled a suit by any plaintiff with an interest "arguably [sought] to be protected by the statutes." Applying that test, the Court concluded that Thompson fell within the zone of interests protected by Title VII, as (i) he was an employee of NAS, (ii) the purpose of Title VII was to protect employees from unlawful actions, and (iii) he was not an accidental victim of retaliation (but rather injuring him was NAS's way of punishing his fiancée).

### **Henry v. New Jersey Department of Human Services**

In April 2004, Lula Henry (Henry), who held a Master's degree, was hired by Trenton State Psychiatric Hospital at an entry-level nursing position. In late Spring/early Summer 2004, Henry developed initial concerns that racial discrimination explained why she was hired at an entry level position, though her concerns were uncorroborated

by any firm evidence. In late Summer 2004, Henry questioned her classification and requested reclassification; in response she remained assigned to her entry-level position. In November 2004, Henry resigned from Trenton State in order to take a position with another entity.

In the Spring of 2006, Henry was informed by a union representative that a Nigerian nurse had contested the placement of a less qualified Caucasian nurse and that there were widespread claims of racism at Trenton State. Henry also learned that a Caucasian nurse with similar credentials to hers was immediately hired into a higher job classification, contrary to what she was told about her placement. Henry claimed that prior to learning this information she had no factual basis to substantiate her earlier suspicions of race-based discrimination.

On July 24, 2007, Henry filed a complaint alleging racial discrimination in defendants' hiring practice and retaliation in violation of the New Jersey Law Against Discrimination (NJLAD). Defendants moved for summary judgment based on the two-year statute of limitations applicable to NJLAD claims. The trial judge granted the motion, determining that Henry's action accrued in 2004 and was not tolled by the discovery rule. The Appellate Division affirmed, and the Supreme Court granted certification. At issue was the impact of the "discovery rule" on NJLAD claims. That rule "delays the accrual of the action until the plaintiff 'discovers, or by exercise of reasonable diligence and intelligence should have discovered, facts which form the basis of a cause of action.'"

Henry argued that her NJLAD claims did not accrue until 2006 because that is when she had some measure of corroboration of her concerns. Defendants argued that the discovery rule should not apply to NJLAD cases, but that even if it did, the rule would not be appropriate under the facts of this particular case.

The Court explained that the discovery rule is a well-established equitable doctrine that is applied when the statute of limitations would cause unnecessary harm without advancing its purpose. However, the Court did not find that there was an equitable basis on which to extend the statute of limitations on Henry's retaliation claim, because that claim must have accrued at or before the date of her resignation in November 2004. As a result, the Court affirmed the Appellate Division's dismissal of the retaliation claim.

The Court reached a different result on Henry's discrimination claim. Noting its approval of the use of the discovery rule in LAD cases "when and where appropriate," the Court held that this case might present such a circumstance. Henry had initial concerns in

2004 about her hiring and classification, but the reason she was given in response had nothing to do with racial discrimination. That, according to the Court, may have led her not to pursue the issue, thereby requiring the tolling of her cause of action. The Court held Henry was entitled to assert that she did not have reasonable suspicion of racial discrimination, even by the exercise of reasonable diligence, until 2006 when, among other things, she learned that less qualified Caucasian nurses were hired into advanced positions and she was told by her union representative about other claims of racial discrimination. Under these circumstances, the Court decided that Henry should get a hearing at which she could show that she acted reasonably in pursuing her claim of discrimination.

*HR Tip of the Month: Employers Beware of Conducting Self-Evaluative Assessments of Compliance with Employment Laws*

A recent case decided by a federal court in Pennsylvania serves as a reminder that a company intent on conducting an internal assessment of its compliance with applicable laws, including wage and hour laws, should carefully consider, in advance of performing that evaluation, its strategy to protect the results from potential disclosure in future litigation. In [Craig v. Rite Aid Corporation](#), 2010 U.S. Dist. LEXIS 137773, a magistrate judge in the Middle District of Pennsylvania considered whether Rite Aid could restrict the plaintiffs' ability to discover potentially relevant documents on the grounds that the documents were protected by the "self-critical analysis privilege," a privilege recognized by some courts in limited circumstances "to protect evaluative materials created in accordance with governmental requirements, or for purposes of "self-improvement."

In [Rite Aid](#), the documents sought to be protected related to the company's voluntary internal assessment of its compliance with the FLSA, labor laws and existing bargaining agreements, initiated as part of a restructuring program led by a Human Resources executive under the direction of the company's in-house counsel. The analysis included information-gathering, assessments, drafts, and recommended changes to store operations, all of which was shared with the in-

house counsel for the purpose of obtaining legal advice and in anticipation of future FLSA litigation. Rite Aid asserted that the self-critical analysis privilege shielded the documents from production. The Court disagreed, expressing doubt as to the privilege's validity in the Third Circuit. Even where the privilege had been recognized, the Court found it did not have widespread application where a company voluntarily undertook an internal review of its own practices and procedures. Although ruling that the defendants could not rely on the self-critical analysis privilege to protect from disclosure the challenged documents, the Court left open the possibility that other privileges, such as the attorney work product doctrine and attorney-client privilege, could offer additional protections.

As the number of wage and hour suits alleging failure to pay overtime continues to increase, it is certainly understandable why employers would want to review their payment and classification practices with an aim towards reducing litigation risk. Prior to undertaking such a review, companies should consider how to best protect the materials generated from such an internal assessment from disclosure in future litigation. The role that various individuals (Human Resources, in-house counsel, outside counsel) should play in the evaluative process, as well as the potential application of recognized privileges to the process, are factors which should be explored. Sills Cummis employment attorneys are available to provide advice in developing and implementing a strategy to maximize the use of such internal assessments while helping to protect the fruits of those assessments from disclosure to third parties.

***Practice Update: Mandatory Mediation in Non-FLSA Employment Discrimination Cases Filed in the Southern District of New York***

Effective January 3, 2011, all employment discrimination cases, except those brought under the Fair Labor Standards Act, in the United States District Court for the Southern District of New York, will be designated for automatic referral under that Court's mediation program. Initially, the Court's Mediation Supervisor will

assign the next available mediator from a list of certified mediators. The parties, however, can request that a mediator with expertise in a particular field be assigned, if such request is made within five days of the Mediation Order.

Details of the Court's mediation program may be found at Local Civil Rule 83.12 of the Local Rules of the United States District Courts for the Southern and Eastern Districts of New York, which are accessible at <http://www.nysd.uscourts.gov/rules/rules.pdf>.

If you would like additional information, please contact:

**Trent S. Dickey, Esq.**

Chair, Employment and Labor Practice Group  
tdickey@sillscummis.com | (973) 643-5863

**David H. Ganz, Esq.**

Of Counsel and Client Alert Editor, Employment and Labor Practice Group  
dganz@sillscummis.com | (973) 643-4852

**Jill Turner Lever, Esq.**

Of Counsel and HR Tip of the Month Editor, Employment and Labor Practice Group  
jlever@sillscummis.com | (973) 643-5691