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Door opened for retaliation claims

Sheri Qualters/Staff reporter | August 9, 2006

BOSTON-A recent Massachusetts Supreme Judicial Court decision paves the way for retaliation claims in a swelling pool of wage and hour cases sparked by a shaky economic recovery, the burgeoning immigrant population and high-profile cases under the state's tip law.

The court ruled that employees who make internal complaints about employment practices are eligible to bring retaliation claims. The case involved wait staff who claimed that they were fired for complaining about a tip-pooling system at the exclusive Locke-Ober restaurant. Samantha Smith v. Winter Place, No. 09544.

The ruling says that workers who sue after facing retaliation from employers for complaining about wage violations are not required to file a complaint with the state attorney general's office first. Because the statute is ambiguous, many practitioners and lower courts viewed seeking help from the attorney general as a necessary foundation for making a retaliation claim in a lawsuit.

Pre-emptive firings

The court noted that requiring this step could discourage workers from trying to resolve disputes "informally," and could prompt companies to fire workers pre-emptively as soon as they heard concerns about alleged wage violations.

"Such outcomes would directly contravene the purpose of the statute, to encourage enforcement of the wage laws by protecting employees who complain about violations of the same," wrote the court in the Aug. 1 ruling.

Shannon Liss-Riordon of Boston's Pyle, Rome, Lichten, Ehrenberg & Liss-Riordan, a plaintiffs' employment attorney who represented the wait staff in the Locke-Ober case, is fighting a growing number of wage-and-hour cases involving retaliation.

A week before her Massachusetts Supreme Judicial Court win, Liss-Riordon collected $1.8 million for her clients, plus prejudgment interest and attorney fees, in a Massachusetts superior court case that also involved retaliation and a tip pooling system. In Calcagno v. High Country Investor Inc., No. 03-00707 (Essex Co., Mass., Super. Ct.), the four major plaintiffs were fired by Hilltop Steak House in Saugus, Mass.

"Locke-Ober and Hilltop should send a strong message that when an employee is asking questions about pay the proper response is not to fire the employee," Liss-Riordan said. In light of the new state high court decision, Liss-Riordan plans to add retaliation claims to some of her dozen or so pending tip cases.

Publicity about previously settled tip cases against tony hotels and restaurants and the prevalence of wage-and-hour violations against a vulnerable immigrant population is increasing the wage-and-hour caseload, Liss-Riordan said.

Gordon P. Katz, a Boston-based Holland & Knight lawyer who represented the Locke-Ober side, agreed that the state high court decision opens the door to wage-and-hour retaliation cases not previously considered viable. "Prior to this decision, there was a view-such as that adopted by the superior court judge-that one needed to make a complaint to the attorney general in order to have established a predicate for a wage-and-hour retaliation claim," he said.

The Locke-Ober case underscores employers' vulnerability in retaliation claims because such claims can survive, even if the underlying wage-and-hour complaint fails, said Constance M. McGrane of Boston's Conn Kavanaugh Rosenthal Peisch & Ford. McGrane said wage-and-hour cases are on the rise in an uncertain economic climate where "people feel they need to use the law to enforce their rights."

Hilltop's attorney, John Coyne of Boston-based Menard, Murphy & Walsh, did not return calls about the case.