



McKENNA  
EMPLOYMENT BULLETIN

James P. DeNardo and Kristin D. Tauras

[www.mckenna-law.com](http://www.mckenna-law.com)

**COURT HOLDS THAT THE FAIR LABOR STANDARDS ACT DOESN'T PROTECT UNWRITTEN, VERBAL COMPLAINTS**

In *Kasten v. Saint-Gobain Performance Plastics Corp.*, No. 08-2820, 7<sup>th</sup> Cir. decided October 15, 2009, the Court reviewed en banc its decision that the Fair Labor Standards Act doesn't protect "unwritten purely verbal complaints." The case arose when the employee alleged retaliation when he was fired alleging he was being retaliated against for complaining verbally to supervisors on many occasions that the placement of the time clock was illegal. The employer fired the employee after the employee failed repeatedly to comply with policies for punching in and out on a time clock. The employee alleged that the placement of the time clock did not allow workers to be paid for time spent putting on and taking off protective work clothing.

The dissent to the denial of a rehearing en banc, stated that oral inquiries, protests and information supplied to an agency representative played no less an important role in the statutory scheme than do letters, e-mails, and sworn statements.

One question is how this decision will square with the U. S. Supreme Court's decision in *Crawford v. Metropolitan Government of Nashville* in which the U. S. Supreme Court held that the anti-retaliation provisions of Title VII extend to an employee who speaks out about discrimination in answering questions during an employer's internal investigation. Answering questions during an employer's internal investigation is, of course, verbal statements and protests.

**RETALIATORY MOTIVE OF SUPERVISOR IS NOT IMPUTED TO THE EXECUTIVE WHO MADE THE DECISION TO TERMINATE THE EMPLOYEE**

In *Long v. Teachers' Retirement System of Illinois*, 2009 WL 3400955 (7<sup>th</sup> Cir. 2009), the Court held that the employee failed to establish a prima facie case of Family Medical Leave Act (FMLA) retaliation. The Court assumed that the direct supervisor had a retaliatory bias towards the employee for taking FMLA leave. But, the Court held that the supervisor's retaliatory bias could not be imputed to the executive director who made the ultimate decision to terminate the employee. This was because, although the direct supervisor recommended that the employer terminate the employee, there was no showing that the executive director even knew that the employee had taken the FMLA leave when the executive director made the decision to discharge the employee. In addition, the director conducted an independent investigation and relied on multiple sources of information regarding the employee's poor performance before arriving at the decision to discharge the employee.

**THE NINTH CIRCUIT HOLDS THAT THE REHABILITATION ACT APPLIES TO INDEPENDENT CONTRACTORS**

In *Fleming v. Yuma Regional Medical Center*, --- F.3d ---, 2009 WL 3856926 (9<sup>TH</sup> Cir., 2009), an anesthesiologist, who was an independent contractor, sued a medical center for breach of employment contract and

disability discrimination, in violation of the Rehabilitation Act, arising from the medical center's refusal to accommodate the anesthesiologist's operating room and call schedules due to his sickle cell anemia. The District Court for the District of Arizona granted summary judgment in favor of the medical center, reasoning that the independent contractor was not an employee and, therefore, not entitled to protection under the Rehabilitation Act. The anesthesiologist appealed.

On appeal, the Ninth Circuit held that the Rehabilitation Act applies to independent contractors. The Ninth Circuit reasoned that the scope of protection granted by the Rehabilitation Act was broader than the scope granted by the Americans With Disabilities Act.

At least three other circuits have dealt with this issue. The Tenth Circuit has held that independent contractors are protected under the Rehabilitation Act and the Sixth and Eighth Circuits have held that the Rehabilitation Act does not protect independent contractors. Given the recent amendments to the ADA and the split in the circuits in how to interpret the Rehabilitation Act, the issue of the scope of the Rehabilitation Act may soon make its way to the U.S. Supreme Court.

## **NON-EMPLOYERS CAN BE LIABLE UNDER THE FAIR LABOR STANDARDS ACT**

In *Montano-Perez v. Durrett Cheese Sales, Inc.*, WL 3295021 (M.D. Tenn. 2009), employees made complaints to their employer about their pay. The employees brought claims against both their employer and against certain police officers in connection with the employees' termination in

retaliation for their complaints about not being paid. The employees alleged that the police officers, working in concert with the employees' employer, arrested the employees and then reported them to the Immigration & Customs Enforcement (ICE) because of their complaints about pay. In a case of apparent first impression, the district court held that the discharged employees of the employer stated a Fair Labor Standards Act (FLSA) claim of retaliation against the police officers.

The court found that, given the broad language of the FLSA's anti-retaliation provision, entities other than an individual's employer can violate the anti-retaliation provision of the FLSA.

## **TESTIMONY OF INABILITY TO DO JOB PREVENTS AN ADA CLAIM**

In *Butler v. Village of Round Lake Police Department*, 2009 WL 3429100 (7<sup>th</sup> Cir. 2009), a police officer testified before a police pension board that his chronic obstructive pulmonary disease (COPD) made it impossible for him to do his job. The court held that because of his testimony before the pension board, the police officer was judicially estopped from asserting that he could perform the essential functions of his job, as required to establish the police officer's Americans with Disabilities Act claim. This was true even though the village officials encouraged the police officer to apply for a pension. The court found that the police officer offered no satisfactory reason for his inconsistency. The court also found that although the pension board did not consider reasonable accommodations, as would be considered in an ADA action, no accommodation would have been appropriate.

---

### **McKenna Storer has offices located at:**

33 N. LaSalle Street  
Suite 1400  
Chicago, IL 60602  
(312) 558-3900

666 Russel Court  
Suite 303  
Woodstock, IL 60098  
(815) 334-9690

*This Employment Bulletin is intended to provide information of general interest and does not constitute legal advice. Readers should consult with their counsel before taking any action based on the information in this publication. All rights reserved. Copyright 2010, McKenna Storer. For information, contact James P. DeNardo at 312.558.3922 or Kristin Tauras at 312.558.3923.*

## **SETTLEMENT AGREEMENT TRUMPS CLAIM OF REHABILITATION DISCRIMINATION**

In *Kersey v. Washington Metropolitan Area Transit Authority*, --- F.3d ---, 2009 WL 3735487 (D.C., Nov. 10, 2009), a transit employee brought an action against his employer, a metropolitan area transit authority, alleging that his employer's refusal to promote him to positions requiring driving was discrimination and retaliation in violation of the Rehabilitation Act, 29 U.S.C. § 794(a). WMATA hired the transit employee as a bus operator. Shortly thereafter, the employee got into a fight with bus passengers, suffered injuries to his neck and back, and took a worker's compensation leave. The employee was still on leave four years later when WMATA terminated him for failing to report that he was arrested twice. After Kersey's union filed a grievance on his behalf, WMATA reinstated him. While still on leave, Kersey got into a fight with a WMATA employee on WMATA property and was again arrested and charged with assault and carrying a deadly weapon. He was subsequently acquitted by a jury. WMATA once again terminated the employee, referencing his medical disqualification from operating a bus based on his neck and back injuries, his record of violent physical confrontations, and his failure to report arrests.

The employee filed a grievance against this second termination. Thereafter, the employee and employer reached an agreement that by its terms constituted a "full and final settlement of this grievance." Under that agreement, the employee was reinstated "to a position of cleaner-shifter with the understanding that...under no circumstance will he be permitted to operate an authority vehicle." Soon after signing, the employee began attempting to apply for positions that required operating

WMATA vehicles. WMATA refused to allow him to take a promotional test for such a position, informing him that the Settlement Agreement precluded him from obtaining the position. The employee sued, claiming that WMATA's refusals to promote him to positions requiring driving constituted retaliation and disability discrimination under the Rehabilitation Act.

The district court granted summary judgment in favor of WMATA, finding, in part, that the employee had failed to rebut WMATA's legitimate, nondiscriminatory explanation for its actions. On appeal, the U.S. Court of Appeals for the District of Columbia Circuit affirmed. It held that the settlement agreement providing that the employee was not permitted to operate vehicles was not rescinded by the employer, and thus the employer's reliance on the agreement was not a mere pretext for discrimination and retaliation, but rather was a reasonable, nondiscriminatory reason for its refusal to promote employee.

---

### **McKenna Storer has offices located at:**

33 N. LaSalle Street  
Suite 1400  
Chicago, IL 60602  
(312) 558-3900

666 Russel Court  
Suite 303  
Woodstock, IL 60098  
(815) 334-9690

*This Employment Bulletin is intended to provide information of general interest and does not constitute legal advice. Readers should consult with their counsel before taking any action based on the information in this publication. All rights reserved. Copyright 2010, McKenna Storer. For information, contact James P. DeNardo at 312.558.3922 or Kristin Tauras at 312.558.3923.*