



BOULDER COUNTY BAR NEWSLETTER

APRIL 2011

RETALIATION IN A TITLE VII CLAIM

BY SHELLEY BAILEY

In *Thompson v. N. Am. Stainless, LP*, - U.S., 131 S.Ct. 863, 866-68, - (2011), the Supreme Court broadened the class of employees who may claim retaliation in a Title VII claim. The opinion also purports to cover a broad range of employer conduct that may not have previously been considered to violate Title VII.

After petitioner Thompson's fiancée, Miriam Regalado filed a sex discrimination charge with the EEOC against their mutual employer, respondent North American Stainless (NAS) fired Thompson. He filed his own charge of retaliation and lawsuit under Title VII, claiming that NAS fired him to retaliate against Regalado for her filing.

The district court granted NAS summary judgment on the ground that third party retaliation claims were not permitted by Title VII. The Sixth Circuit, en banc, affirmed the district court, reasoning that Thompson was not entitled to sue NAS for retaliation because he had not engaged in any activity protected by the statute. The Supreme Court reversed.

The Supreme Court first noted that Title VII's anti-retaliation provision must be construed to cover a broad range of employer conduct. It prohibits any employer action that "well might have dissuaded a reasonable worker from making or supporting a discrimination charge." The court held that a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiancée would be fired.

DID NAS'S FIRING OF THOMPSON CONSTITUTE UNLAWFUL DISCRIMINATION?

NAS's argument was that prohibiting reprisals against third parties would lead to difficult problems drawing lines between the types of relationships entitled to protection. However, the Court disagreed, stating that "we expect that firing a close family member will almost always meet the necessary standard and inflicting a milder reprisal on a mere acquaintance will almost

(continue on page 4)

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See page 6 for details.
Deadline is June 1

MARK YOUR CALENDARS

Longmont Lawyers Lunch
Wednesday, April 20 at Terroir

Friday, May 13
Bench Bar Retreat
Social Networking: Does It
Simplify or Complicate Our Lives?
4 ethics credits
CU Law School 1 - 5 PM

Tuesday, May 24
Annual Medical Legal
Legislative Dinner 5:30 PM at the
Boulder County Club
BCBA and Boulder Medical Society

BCBA Annual Meeting and Dinner
Thursday, June 2
Folsom CenterPlate at 5:30 PM

TABLE OF CONTENTS

TITLE VII CLAIMS 1 CALENDAR OF EVENTS 2 INTERNATIONAL ABDUCTION 3
PRESIDENT'S PAGE 5 LAWYER ANNOUNCEMENTS & JUDGE GLOWINSKY RETIREMENT PARTY 7
PRO BONO PAGE 9 SENIOR LAW DAY CLASSIFIED ADS 11

CALENDAR OF EVENTS

Pre-registration is required for all BCBA CLE programs. Register by e-mailing lynn@boulder-bar.org, or pay online with a credit card at www.boulder-bar.org/calendar. You will be charged for your lunch if you make a reservation and do not cancel prior to the CLE meeting. BCBA CLE's cost for members is \$20 per credit hour, \$10 for New/Young lawyers practicing three years or less. \$25 for non-members.

Tuesday, April 5
Dialogue with the Judges on ADR
as it relates to family matters
Presenters: 20th JD Judges &
Magistrates
Noon – 1:30 in the Justice Center Jury
Assembly Room
2 general and .6 ethics CLE \$40,
\$20 for new/young lawyers
Lunch \$10 (turkey bacon wrap,
Thai chicken wrap, veggie wrap,
salad w/ or w/o meat)

Thursday, April 7
Natural Resources and
Environmental Law
Chromium, Cancer, and the CIA:
A Talk by Author Benjamin Ross
Presenter: Benjamin Ross,
Noon-1:00 at CU Law School, Room 204
1 general CLE free. Lunch provided.

Sunday, April 10
Boulder County Bar Foundation
Annual Dinner and Meeting
5:30 PM Hotel Boulderado

Tuesday, April 12
Employment Law
Effective Work Place Investigations
Presenter: Chris Chrisbens, Mountain
States Administration
Noon at Caplan and Earnest
1 CLE \$20, \$10 for new/young lawyers
Lunch \$10

Tuesday, April 12
Elder Law Committee and
Availability of Legal Services
Public Benefits for the
Elderly and Disabled
Presenters: Christina Ebner
and C. Jan Lord
Noon – 1:30 Brownbag lunch in Boulder
Justice Center in Courtroom B
2 CLEs \$40, \$20 for new/young lawyers

Thursday, April 14
Intellectual Property
Cloud Computing
Presenter: Jason Haislmaier
Noon at Hutchinson Black and Cook
1 CLE \$20, \$10 new/young lawyers
Lunch \$10

Monday, April 18
Pro Bono Luncheon and Awards
11:45 at the Marriott Boulder
2660 Canyon
\$27 per person
1 general and .3 ethics CLE
RSVP to Boulder County Legal Services
303-449-2197

Tuesday, April 19
Paralegal Section
Immigration Law Update: What
Paralegals and Lawyers Need To Know
Presenter: Brad Hendrick
Noon at Caplan & Earnest
1 CLE \$20 \$10 Lunch

Wednesday, April 20
Longmont Lawyers Lunch
Noon at Terroir, 3rd and Main,
Longmont
Presenter: Judge Noel Blum
Lunch and 1 CLE \$20

Tuesday, April 26
Business Law
Hot Topics: Representing Natural
Products Companies
Presenters: Fern O'Brien
and Debra Huttner
Noon at Holme Roberts and Owen
1801 13th St., Suite 300 Lunch \$10
1 CLE \$20, \$10 for new/young lawyers

Saturday, April 30
Boulder Farmers Market
Law Day Ask A Lawyer Project
Volunteer BCBA members
in the park to give legal information.
Call to volunteer for the fun.

Tuesday, May 3 for 8 Tuesdays
Legal Spanish I and Legal Spanish II
5:30-7:00 PM at Broadway Suites
Conference Room
1942 Broadway
Instruction and Materials by Sean
Stromberg, Court Interpreter, \$250
12 CLE credits available \$200

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A NOT SO UNCOMMON STORY: INTERNATIONAL CHILD ABDUCTION

By JONATHAN BOOKER AND CAROLINE LANGLEY

Quinton is a twelve-year boy from Johannesburg, South Africa, and for the first 10 years of his life South Africa was his home. His life was turned upside down in July 2009, when Quinton traveled to Denver, Colorado, to visit his estranged father. Now, almost two years later, with the help of Boulder-based law firm Family Law International, Quinton has finally been reunited with his mother. Together they have returned to Johannesburg.

Quinton's story is not uncommon; in fact, thousands of children are abducted or retained abroad each year by a parent. International child abduction cases often involve very similar fact patterns. Here, the child was visiting his non-custodial father for two weeks. When it came time to return to South Africa, Father ("taking parent") informed Mother ("left behind parent") that Quinton would be remaining in the US. Father subsequently cut off all communication between mother and son. One recourse available to a "left behind parent" is to institute a civil action for return under the 1980 Hague Convention on the Civil Aspects of International Child Abduction ("Hague Convention").

The Hague Convention provides a mechanism for left behind parents to effectuate the return of wrongfully removed or retained children to their place of habitual residence. In essence, the Hague Convention allows courts of signatory states to determine the habitual residence of the child, which in turn determines the most appropriate forum for adjudicating child custody matters. The Hague Convention itself is a remedy of return only; it does not resolve child custody disputes.

There are 84 signatories to the convention. The convention's membership continues to grow, but notable absentees include much of the Middle East, China, Russia and Japan, all of which continue to draw extensive criticism from the international community for their absence.



To succeed in a Hague Petition for Return, the petitioner must prove a prima facie case of wrongful removal or retention by a preponderance of the evidence. There are three elements that comprise a prima facie case of wrongful removal or retention. First, the petitioner must demonstrate that the child was a habitual resident of the left-behind country immediately prior to the wrongful removal or retention. Second, that the petitioner had rights of custody over the child at the time of the wrongful removal or retention. Finally, that the petitioner was in fact exercising rights of custody over the child at the time of the wrongful removal or retention. On establishing a prima facie case, the burden shifts to the respondent to prove a defense to return under the convention.

There is no definition of habitual residence in the Hague Convention, so one must look to the Perez Vera report, the official interpretation of the Hague Convention, and case law for guidance. Evidence of the child's life in South Africa was presented in order to prove South Africa was the child's habitual residence. An expert in South Africa family law was also retained to testify as to the meaning of "rights of custody" under South African law. Finally, calling witnesses to demonstrate that Mother was exercising rights of custody over her son immediately prior to the wrongful retention proved prudent.

Thereafter, the burden shifted to the respondent father to prove one of several defenses open to him under the convention. These defenses to return included consent, grave harm or that return would violate the fundamental principles of the requested state concerning human rights and fundamental freedoms. Federal case law has reiterated that all defenses should be narrowly interpreted and applied. Specifically, if the Petitioner proves their prima facie case, a presumption favoring return arises unless the Respondent proves a defense by the appropriate burden of proof.

The Hague Convention and its implementing statute ICARA do not stand alone, and must be argued in conjunction with the UCCJEA, UCAPA and PKPA. An Expedited Hague Petition for Return should be adjudicated within six weeks of filing. The expedited nature of these proceedings limits the possibility for extensive discovery, but waives the requirement for the authentication of documents. In Quinton's case, the parties appeared in U.S. District

(continued on page 10)

TITLE VII CLAIMS *(continued from page 1)*

never do so.” The court did not generalize the holding to other situations.

IF THE FIRING DID CONSTITUTE UNLAWFUL RETALIATION, DOES TITLE VII GRANT THOMPSON A CAUSE OF ACTION?

The statute provides that “a civil action may be brought . . . by the person claiming to be aggrieved.” The court held that there is a common usage of the term “person aggrieved.” The Administrative Procedures Act authorizes suit to challenge a federal agency action by “any person . . . adversely affected or aggrieved . . . within the meaning of a relevant statute.” In previous opinions, the Supreme Court has held that a

plaintiff may not sue unless he “falls within the ‘zone of interest’ sought to be protected by the statutory provision whose violation forms the legal basis for his own complaint. The Court has described the “zone of interest” test as denying a right of review “if the plaintiff’s interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot be reasonably assumed that Congress intended to permit the suit.”

However, applying the test in this case, the Court concluded that Thompson fell within the zone of interests protected by Title VII. The Court noted that Thompson was not an accidental victim of the employer’s unlawful retaliation.. “To the

contrary, injuring him was the employer’s intended means of harming Regalado. Hurting him was the unlawful act by which the employer punished her. Therefore, Thompson was well within the zone of interests sought to be protected by Title VII and was an aggrieved person with standing to sue.

CONCLUSION

Although the Court did not draw any bright lines on how to determine what type of relationship is sufficient for purposes of suing under Title VII, the Court did broaden the horizons of suits by those close to a discrimination victim. It may now be easier for third parties claiming retaliation to establish that they are in the statutory “zone of interest” if they are closely related to a person who engages in protected activity.

Shelley Bailey is an assistant Boulder County attorney whose area of practice includes employment law. She is also co-chair of the BCBA Employment Law Section.



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PRESIDENT'S PAGE

GOING BANANAS

BY RICH IRVIN



"These are traitors, little Benedict Arnolds in skirts. They are not true to their husbands."

This was the culmination of the closing argument presented by the US Attorney, Thomas Morrissey in the treason trial of Shivze "Flo" Otani, Misgo "Bilile" Tanigoshi and Tsuruki "Toots" Wallace. They were second-generation Japanese-American (Nisei) women married to Caucasian men (except Flo) who had been living in California when they were relocated to the Amache internment camp in Colorado.

They were released to work and live on an onion farm near Trinidad, Colorado. They met Heinrich Haider and Hermann Loescher, German POW's held at Camp Trinidad. The Camp housed over 3,000 German POW's who were sent off to private farms to work to replace those men who had gone off to the service. While working on the onion farm they met and wooed (and more) the three Nisei sisters.

On October 17, 1943 the sisters helped the two German POW's Lotharios (isn't that a great word? I've always wanted to use it. It means a rake, seducer of maidens) escape from the

POW camp and drove them over Raton Pass to Springer, New Mexico. (four other POW's also made an unrelated escape.)

The three sisters were charged with the capital offense of treason and with conspiracy to commit treason. They were tried in US District Court in Denver, before Judge Foster Symes on August 7, 1944. They were convicted of conspiracy to commit treason and Judge Symes sentenced "Toots" to 2 years in prison and "Flo" and "Billie" to 20 months.

That is the introduction to my movie with an absurd treason trial at its center, "Bananas" by Woody Allen. Fielding Mellish has gone off to San Marcos to reignite his relationship with Nancy (Louise Lasser). There, after a series of comic mishaps, the guerilla commander (Fidel Castro?) goes bonkers after winning. He changes the language from Spanish to Swedish and makes all citizens wear their underwear on the outside. Mellish is picked to be the new president and seeks financial aid from the

United States as San Marcos's only export is dysentery.

In the US he is put on trial for treason. J. Edgar Hoover testifies against him, dressed as a black woman (It later came out this was not far from the truth.) He testifies in his own defense, questions himself and breaks himself down on the stand. Miss America testifies that Mellish is a traitor because "his views are different from those of the President." He is bound and gagged and breaks down a hostile witness.

There are a number of comic episodes during the "trial." It really should be seen by all judges and lawyers whether or not they have a courtroom practice. As I have said before, we need to lighten up and have fun. "Bananas" is fun and then some. Mellish is convicted and sentenced to two years in prison, suspended on condition he not move into the judge's neighborhood.

(continued on page 6)

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PRESIDENT'S PAGE *(continued from page 5)*

The trial of the three "Nisei Sisters" was almost as farcical as "Bananas." They were clearly guilty of helping the German POW's escape, but there was no evidence that they were guilty of treason. To be guilty of treason a person must do more than help an enemy. She must intend that act to injure the United States or assist in the enemy's cause. It was not treason simply to help the German POW's escape for romantic reasons. The fact that the three were also interned made the government want to make an example of them. Attorney General Thomas Clark (Ramsey Clark's father) wanted to prosecute the sisters to discourage others from rendering assistance to POWs. There were 167,748 POW's in the US, 2,222 escaped, and 17 of those were still at large in November 1947.

The government suppressed evidence that the German POW's and two of the sisters had been in a romantic relationship. It was bad enough to help the German POW's escape, the fact that the women were Japanese and married made it a capital case. I got the bulk of my information from Dr. William Wei's article, "Sex, Race and the Truth of Three Nisei Sisters," in Colorado Heritage, Autumn 2007, and Professor Eric Muller's "Betrayal on Trial," North Carolina Law Review 82 (June 2004).

The similarity of this trial to "Bananas" is striking. Two witnesses are required to convict a person of treason. The government was forced to call Haider and Loescher, who made deals with the government not to make public their romantic entan-

gements with the defendants. Haider, surprising the government, testified that he told the sisters he wanted to escape so that he could fight against Hitler in the resistance. Loescher said he only wanted his freedom in Mexico so he could be done with the war. It didn't help the government's case that those two masterminds had been arrested in Waltrus, New Mexico after getting in a bar fight while flirting with other women. The three sisters were charged because amorous pictures of the sisters "spooning" with the Germans had been recovered from Haider by the New Mexico sheriff and were released and published in The Denver Post with the caption "Allies in Arms."

(continued on page 8)

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The Find A Lawyer on the BCBA website will begin annual renewals in May.

Please note: We will send out notices in April to those who are already listed but **NOW is the time for attorneys to sign up if you are not already listed.**

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LAWYER ANNOUNCEMENTS

The 2010 Colorado
Judicial Department Court

Employee of the Year award went to
Gayle Tenorio
Division Clerk in the Boulder County Court.

The Colorado Judicial Branch annually recognizes a handful of outstanding employees for exemplary work contributing to the high quality of service provided throughout the state's 22 judicial districts.

Tenorio was nominated for the award by a judge, magistrate and a handful of court judicial assistants in the 20th Judicial District. Tenorio's positive attitude, work ethic and attention to detail were all traits noted by those who nominated her.

"I am constantly receiving comments from attorneys, litigants, the public and other dedicated court staff about how pleasant and helpful Gayle always is," said County Court Judge Noel E. Blum.



Please join us for fun, food, and fond memories at a retirement party for

Judge Carol Glowinsky

April 29, 2011

4 - 5:30 pm

Boulder Jury Assembly Room
Boulder County Justice Center

1777 6th Street, Boulder, CO 80302

If you would like to speak at Judge Glowinsky's retirement party or send written remarks, please email former Boulder District Court Judge Dan Hale, dhale@jaginc.com.

Judge Hale will be the emcee for the party!

NOMINATIONS WANTED

FOR
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These awards will be given at the
June 2 BCBA Annual Dinner.

*Please send nominations to
christine@boulder-bar.org*

Your nominations will be accepted until May 20.

PRESIDENT'S PAGE *(continued from page 6)*

The government had evidence that the sisters had assisted the Germans' escape, but none of treason. "It was a one night stand between a few promiscuous women and opportunistic German POWs" (William Wei). Loescher wrote a letter to Judge Symes that the sisters tried to dissuade them from the escape. He related that the German POW's seduced the sisters into changing their minds, and "without our urgent persuasions they would never have agreed." Because they looked like the enemy their indiscretion became treason.

Their court-appointed attorney, Kenneth Robinson, conceded that his clients committed adultery and helped the Germans escape but argued that did not constitute treason and they were seduced into helping the Germans. He argued in closing "There are four things that passeth understanding. They are the way of the bird in the air, the way of the serpent upon the rock, the way of a ship at sea- and the way of a man with a maid."

US Attorney, Tom Morrissey argued in response that "a wife who will betray her husband is a woman who will betray her country."

Doesn't this sound like it was written by Woody Allen? The trial could have proceeded only in war-time anti-

Japanese hysteria of 1943-1944. The newspapers covering the trial, the jurors and the trial judge saw that there was less to the government case than met the eye: There was no there. The Judge stated from the bench: "After listening to all the evidence, I did not believe the defendants had any intent to harm the United States or help the German government. I had made up my mind the defendants were not guilty of treason on the first count."

The verdict of conspiracy was a compromise. As Professor Muller points out about this episode: "It is a tale of presumed disloyalty, and that presumption touched not just Toots, Flo and Bille. It touched every American citizen of Japanese Ancestry alive in the United States when bombs fell on the ships at Pearl Harbor."

Only three treason trials were brought during World War II. Two of them were for actual acts of sabotage by German sympathizers. The trial of the Nisei sisters for treason was a "Bananas" parody of justice. Foolishness and misbehavior do not constitute treason. It was brought by the government to validate the unlawful and xenophobic incarceration of American citizens simply because of who they were. Remember, Treason was a capital offense. I have made light of the trial but it was deadly seri-

ous. It could have only occurred during wartime hysteria.

The true treason was to American values and ideals by the forced relocation and incarceration of American citizens only because of their ethnicity. That is why we as members of the bar must always be vigilant. To protect the rights of all we must protect the rights of those presumed disloyal only because of who they are. We are the first line of defense. (Along with Ralph Carr)



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PRO BONO PAGE

Pro Bono Referrals

Thirteen cases were referred during February. Thank you to the following attorneys:

Don Alspaugh
Daniel Flynn
Peggy Goodbody
Judson Hite
Kim Hult
Paul Karlzen
Gary Merenstein
Michael Miner
Joan Norman
Scott Osgood
Leonard Tanis
Chelsea Victor

Pro Se Program Volunteers

Sheila Carrigan
M.L. Edwards
Lauren Ivison
Tucker Katz
Michael Morphew
Craig Small

Mediators

The following mediators accepted a pro bono case in February:

Kathleen Franco

BCAP Volunteers

Thank you to the following attorneys who accepted pro bono referrals for the Boulder County AIDS Project in February:
Rich Irvin
Laurel Herndon,
Immigrant Legal Center of Boulder County

Pro Bono Corner

Interested in a Pro Bono case?
Please call Erika at 303-449-2197.
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**Boulder County
Bar Association
Professionalism Committee
On-Call Schedule**

April 4	Trip DeMuth	303.447.7775
April 11	Lee Strickler	303.443.6690
April 18	Mark Langston	303.440.9684
April 25	Bev Nelson	303.554.7030

Jane Gill Kellenberger
December 16, 1932 - March 12, 2011

Jane passed away surrounded by her family at
Hospice Care Center of Boulder County.

We will all remember Jane for her tireless work with Boulder County Legal Services, which she helped establish in 1975, and as a passionate advocate for lawyers providing pro bono services to the less fortunate. She did extensive work for Colorado Legal Services and was Colorado Bar Association's Director of Legal Services and chair of the Availability of Legal Services Committee.

We honor her for her extraordinary contributions and cherish her wonderfully warm and caring personality.

A memorial service is being planned for May.

PLEASE CONSIDER BEING A LEADER OF THE BOULDER COUNTY BAR

BCBA Directors begin the search for new leaders of the Boulder County bar each spring. One three-year term, as well as the secretary/treasurer position, are open. The new secretary/treasurer will be president-elect in 2012 and president in 2014.

The fundamental mission of the BCBA is to serve its members, help the public understand our legal system and promote the highest level of professionalism for the practicing bar. The board must continually reach out to new lawyers and non-members and seek the input of a board range of lawyers to enhance the practice of law.

The board of directors manages and makes policy for the BCBA. There are 9 voting directors elected by the membership. Director terms are three years, running July 1 - June 30. Board members must be current BCBA members and be prepared to carry out these duties:

1. Actively support and be familiar with the bar's mission, programs and activities and attend the majority of BCBA-sponsored events;
2. Participate in board orientation activities and review resource information. Additional information should be sought from the executive director or president to ensure full participation in the organization;
3. Attend the overnight annual retreat in June.;

4. Attend at least 75% of these meetings. The board meets on the first Thursday of the month at 7:30 - 9 AM. Two meetings a year are held outside of Boulder, followed by a hosted board/group information meeting. Occasionally alternative days are selected or special meetings are held.
5. Prepare for and actively participate in board meetings. This includes reading the materials distributed before the meeting. Board members should be prepared to develop and publicly articulate BCBA policies, financial overview and significant member-related, organizational or professionalism issues.

6. Serve as liaison to the sections, which usually meet monthly, including regular contact with the section co-chairs and participation in CLE section meetings.

The nominating committee selects new board members, looking for lawyers to reflect the demographics of the BCBA membership, younger and older lawyers, lawyers from throughout the county, law school professors, judicial officers and those in the public sector.

ABDUCTED

(continued from page 3)

court for a trial on the merits within five weeks of filing the petition.

As a lawyer, reuniting Quinton with his mother after he was wrongfully retained in the United States for almost two years was personally satisfying. However, the negative consequences of such a protracted retention of a child from his country, his home, and his mother may never be fully known.

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