

### NEBRASKA EXPANDS EMPLOYER'S LIABILITY FOR RETALIATION FOLLOWING WORKERS' COMPENSATION CLAIM

Employers must act cautiously when considering whether to demote an employee who has filed a workers' compensation claim. In 2003, the Nebraska Supreme Court ("Court") recognized an exception to at-will employment based on public policy when an employee was terminated in retaliation for filing a workers' compensation claim. A recent split decision by the Court in *Trosper v. Bag 'N Save* ("*Trosper*") has expanded that previously recognized exception to include retaliatory demotions. The following is a summary of the Court's decision.

Kimberlee Trosper was employed by Bag 'N Save. After suffering a work-related injury and filing a workers' compensation claim, she was demoted from deli manager to deli clerk and her pay was decreased by \$7,600 per year. Trosper then brought a lawsuit claiming that Bag 'N Save violated Nebraska public policy by demoting her in retaliation for filing a workers' compensation claim.

The Court held that the exception to at-will employment, which previously only included terminations, should be expanded to include the lesser retaliatory act of demotion. It reasoned that its decision was a natural expansion of its prior 2003 decision and was necessary to protect employees; while demotion is less severe than termination, it still has significant negative implications for the employee and is substantial enough to deter the filing of a workers' compensation claim. The Court explained that if it refused to recognize a claim for retaliatory demotion, it would provide an incentive for employers to demote, rather than to terminate, employees who exercised their right to file a workers' compensation claim.

The dissenting opinion, while not condoning any form of retaliation against an employee who files a workers' compensation claim, recognized that a job-related injury often necessitates changes in the employment relationship. Questions posed in response to the Court's holding in the dissenting opinion included: Whether a transfer to a different position, possibly at a reduced wage, to accommodate a worker would be considered a retaliatory discharge? Would routine disciplinary actions involving workers' compensation claimants be the basis for a retaliation lawsuit? If an employer is forced to restructure its workforce due to business conditions, will the employer be required to exempt workers' compensation claimants to avoid a retaliation claim? Will an employer be prevented from taking measures to address unsatisfactory job performance by an employee with a pending workers' compensation claim?

All of the questions raised in the dissent are issues that Nebraska employers must consider and struggle with. Since *Trosper* is now law, all employers should be aware of the holding in this recent decision by the Court and remain cognizant of its implications when considering any adverse employment action against an employee who has filed a workers' compensation claim. Any reasons prompting a demotion should be thoroughly documented, as establishing a legitimate, nonretaliatory reason for the decision will be extremely important to avoid claims by employees under *Trosper*.

### The Koley Jessen Employment Law and Labor Relations Group:

**Margaret C. Hershiser**

402.343.3711

[margaret.hershiser@koleyjessen.com](mailto:margaret.hershiser@koleyjessen.com)

**Richard D. Vroman**

402.343.3810

[richard.vroman@koleyjessen.com](mailto:richard.vroman@koleyjessen.com)

**Ryan J. Sevcik**

402.343.3859

[ryan.sevcik@koleyjessen.com](mailto:ryan.sevcik@koleyjessen.com)

**Julie A. Schultz**

402.343.3766

[julie.schultz@koleyjessen.com](mailto:julie.schultz@koleyjessen.com)

**Leilani M. Harbeck**

402.343.3767

[leilani.harbeck@koleyjessen.com](mailto:leilani.harbeck@koleyjessen.com)